

1940

State of Utah v. E. B. Erwin, Harry Finch and R. O. Pearce : Brief of Respondent

Utah Supreme Court

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No. 6200

In
The Supreme Court
of the
State of Utah

STATE OF UTAH,
Plaintiff and Respondent,
vs.
E. B. ERWIN, HARRY FINCH
AND R. O. PEARCE,
Defendants and Appellants.

Appeal From Third District Court, Salt Lake County
Hon. Oscar W. McConkie, Judge

RESPONDENT'S BRIEF

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In
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STATE OF UTAH,

Plaintiff and Respondent,

VS.

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Defendants and Appellants.

Appeal From Third District Court, Salt Lake County
Hon. Oscar W. McConkie, Judge

RESPONDENT'S BRIEF

STATEMENT OF FACTS

None of the defendants in this case have attempted to make a statement of the facts introduced in evidence in the trial court. Instead they have contented themselves with taking the testimony of each witness individually and without considering such testimony in the light of the other evidence have

merely said that such testimony is inadmissible and proves nothing. Counsel for the State will attempt to make a rather comprehensive statement of the facts and will, as near as possible, place the facts in their chronological order.

During the year 1935, E. B. Erwin became a candidate for Mayor of Salt Lake City. Erwin first met Harry Finch between the primaries and final election of that year in the office of A. S. Brown. The supporting of Erwin was discussed and Finch testified on cross examination that he believed he said at that time that he would give Erwin some help in that election. (188). (Although on direct examination he stated he had not supported Erwin, but had supported his opponent). (171).

Between the election in November and the 15th of December, 1935, Finch was contacted by Ralph Stewart, Erwin's campaign director, and was asked who would make a good Chief of Police. A subsequent conversation was had with Stewart on the same subject, but in neither conversation was anything said about Finch being Chief. (205 and 206).

Erwin, having been elected in November, 1935 took the oath of office on the first Monday of January, 1936, and on that day was by the Salt Lake City Commission assigned to the Department of Public Safety. Under the Ordinances of Salt Lake City, Exhibit (a), one of the subordinate departments within the said Department of Public Safety was the Police Department. Said ordinances further provided that the Commissioner of Public Safety had sole executive and administrative powers and authority in such department and under the direction of the Board of Commissioners had charge and control of the Police Department. The said Commissioner was responsible to the Board of Com-

missioners for the proper conduct of each Department under his supervision. (See Instruction 11).

Under the authority granted by the Ordinances, Erwin appointed Austin Smith his secretary on January 6, 1936, and at about the same time John S. Early was appointed Office Manager of the Department of Public Safety on the recommendation of Erwin.

In January of 1936, Finch was asked by Mr. Gardner, a friend of his, to come to his house, that he thought Austin Smith and Mr. Pinney wanted to talk with him about his being appointed Chief of Police. Mr. Pinney at that time was a reporter on the Tribune and later became Erwin's secretary. Finch went to Gardner's home and discussed with Smith his appointment as Chief of Police. (188). The latter part of January or the first part of February, Finch discussed his appointment as Chief of Police with Erwin. On February 18, 1936, Finch, on the recommendation of Erwin, was appointed Chief of Police. Said appointment to become effective March 15, 1936. Payne was the Chief of Police at that time and Finch was to succeed him.

Parenthetically it might be here said that Finch from 1925 to 1934 was a Commissioner of Salt Lake City in charge of parks and public property. During this time there was considerable difficulty on many occasions with the Police Department and such matters were discussed in the Commission. From this he came to know something of the affairs of the Public Safety Department. Also, through these difficulties and discussions in these meetings he learned something about part of the underworld conditions. (Sup. Ab. 19). Also, during this time he knew that the Commission had trouble with men in Ben Harmon's place. Mr. Finch also had

operated a restaurant on Second South for thirty-five or thirty-seven years and before Prohibition was in the liquor business and during such time became acquainted with Ben Harmon and Abe Rosenblum. He had heard of Bill Browning by reputation and knew he was a bookmaker. He had heard by reputation that Cliff Jennings was a bootlegger and bookmaker.

After his appointment and until March 15, Finch spent at least part of each day at the Police Department familiarizing himself with the police work and routine. Under the Ordinances of Salt Lake City, the Police Department is under the management of the Chief of Police, except as otherwise provided by law or ordinance. The Chief of Police had the control, management, and direction of all members of the Department in the lawful exercise of his functions, with full power to suspend any subordinate officer or employee for a period not exceeding fifteen days when in his judgment the good of the service required it. The Chief had in the discharge of his duties like powers and was subject to like responsibilities over sheriffs and constables in similar cases. He was, under the duty of his office, required to suppress riots and disturbances and breaches of the peace and apprehend any persons committing any offense against the laws of the State or the ordinances of the City, and at all times he was to diligently and faithfully discharge his duties and enforce all ordinances and regulations of the City for the preservation of peace and good order and the protection of the rights and property of all persons. Said ordinances further provided that he should consult and advise with the Commissioner of Public Safety and act with his approval on all matters pertaining to the Police Department and was to make

such reports as the Commissioner of Public Safety should require. (These Ordinances are contained in Exhibit (a)).

In the latter part of February or the early part of March, 1936, Erwin talked with Early and stated to him that he had heard there was a pay-off through the Police Department; that he was desirous of finding out to what extent the pay-off was and who was making it, if possible. Erwin further said, "Jack, get all the information that you can with reference to it." (Sup. Ab. 4). In the latter part of March he asked Early what he had been able to find out. Early told him that he had discussed the matter with numerous of the officers and was unable to get any information whatever and that he had discussed it with another party who had said that there was a pay-off of approximately \$2,000 per month. He told Erwin that this party claimed that it was a pay-off on prostitution, Chinese lotteries, card games, and horse racing.

On March 19, 1936, R. O. Pearce, was trying a lawsuit, the name of which was Pearson v. the Erwin Motor Company. Mr. Pearce was acting as counsel for the defendant. Erwin was there and took the witness stand.

On March 23rd, Ben Hunsaker and his son Clifford, called on Erwin in his office in the City and County Building for the purpose of settling a business transaction with Erwin involving an automobile business deal between the Hunsakers and Erwin. In the course of their conversation Erwin stated that he had been assigned to the Public Safety Department; that he had his Chief of Police and expected him to bring him in good money. Erwin stated that he wanted to get the financial

end of the thing and still had hopes that he would get the financial end of the City. He said that if he did, he would make a lot of money out of it. If he got the financial end of the City he was sure he would be able to pay the note off in a very short time. This was a \$10,000 note. Hunsaker told him that he, Hunsaker, wanted him to make the payments on that note and that he knew Erwin could pay it out of his salary and not out of graft. Erwin stated he could pay the note off. That he could make a payment of \$200 per month out of his salary and that he didn't want more than eighteen months. Erwin stated that he was sure that he would have it paid before that time. The note was for a little more than \$10,000. Erwin again said that he expected to get the financial end of the city and that if he did he would be able to pay this note off. Hunsaker told Erwin that he had better go straight in the future, although he hadn't in the past. Erwin replied that they all do it and that he was going to get his while he had a chance. Erwin asked that if he could pay this note off before it was due if he would refund the interest and Hunsaker said that he would. A memorandum was signed up to that effect.

About two weeks after the Chief took office, which would be about April 1st, Early had a conversation with Finch in which he told Finch that he had heard rumors that there had been graft going on. Finch stated that he hadn't heard anything about it and had had no reports from any one in the Department. (25). On the first of April, Finch reorganized the Anti-Vice Squad and placed Golden Holt in charge of that squad. H. K. Record at the time Finch became Chief had headed this squad and did so up until the first of April. Holt was given two men to work with. The duties of the

Anti-Vice Squad were to take care of all forms of vice, such as gambling and prostitution. Holt talked with Finch just prior to his appointment and also afterwards. A few days after the first of April, Finch and Holt had a conversation in which they talked over the vice situation. The Chief stated that he didn't particularly object to vice, but he didn't want them to get the best of the Department, that is, not to let them run too openly.

After this change in the vice squad, a number of persons came into the Public Safety Building to see Early about operating in Salt Lake City. These men included Mr. Browning, a Chinaman named Wong, Cliff Jennings, William Cayias, Ben Harmon and Abe Rosenblum. These conversations extended possibly into May of 1936. (25). Mr. Browning came in at one time and talked with Early and then went over to the secretary's office. There was no other way of getting into Finch's office. Harmon was in Early's office on several occasions and on one occasion went into the secretary's office. He also saw Abe Rosenblum around the Public Safety Building and on one occasion saw him go toward the Chief's office. As stated above, these conversations probably covered a period of time from April to the latter part of May and that some time afterwards Early had a conversation with Finch in which he stated that there were rumors that there had been considerable pay-off and Finch stated that these people know their own business and would have to operate their own business. That it was his duty to operate the Police Department and he proposed to operate it.

About a month after Finch was appointed, which would make it about April 15th, Austin Smith went to Finch's home about 7:00 or 8:00 o'clock at

night at the request of Finch. Smith asked Finch how he liked his job and Finch stated that it was alright. Things generally pertaining to the Department were discussed, and in that conversation Smith asked Finch approximately what the payoff was as it existed at the time, and Finch answered that it was approximately \$2,000 a month. Smith asked him who was getting it or who collected it and what became of it and Finch said that probably Abe Rosenblum would collect it as he had had experience along that line. (29).

At about this time A. H. Ellett, Judge of the City Court also had a conversation with Finch. On the day of this conversation, Judge Ellett who was then at the Police Court in the Public Safety Building, indicated in open court that certain charges against keepers of gambling games were felonies and that he would not take jurisdiction of them and that these felony cases would have to be taken to the County Attorney's office. Immediately after Judge Ellett got off the bench, within about 15 or 20 minutes, Finch called him on the telephone and stated that he would like to come up and talk about these gamblers. Judge Ellett told him to see him in the morning at 9:00 o'clock. At about 5:30 or 6:00 o'clock of this same day Judge Ellett saw Finch on the first floor of the Police Station. They went into where the captain sits and were looking at some cleaning or painting work that was being done and they walked into the Chief's office. Toward the end of the conversation, the Chief said, "Judge, why can't we get together on the sentencing of these gamblers, let them pay the fine, let the City get the revenue." Judge Ellett said the reason they couldn't do that was "because my friends tell me you are taking \$2500 per month in your hand behind your back and I am not going to

be a party to it. We can't get together on it." Finch said nothing and after about a minute or two made some remark and the meeting broke up right thereafter. That during the minute or two referred to Finch was looking down at his shoes. (Under the State charge of keeping a gambling game, the penalty is imprisonment in the State's penitentiary. Gambling under the City Ordinances carries with it a fine or jail sentence, or both). (75 to 77; Sup. Ab. 9 to 11).

In June of 1936, Austin Smith had a conversation with a newspaper man in Salt Lake City and after this conversation he received a memorandum at his office. This memorandum was placed on the Mayor's desk and later a conversation was had by Smith with Erwin. This memorandum contained a list of the supposed pay-offs in town, the gambling houses and houses of prostitution and opposite each one of them was set aside a supposed amount that was being paid by those houses. In this conversation with the Mayor, Smith stated that the persons who had talked to him about it said that unless these things were taken care of the lid would be blown off. The Mayor told Smith that it would immediately be investigated, that he did not know anything about it.

During this same month Austin Smith went to Captain Taggart's office and there met Mr. Holt and had a conversation with him. He went there at Holt's request. A couple of days after this Smith went to the Police Station and talked with Erwin, telling him he had had a conversation with some one who apparently knew conditions first hand. Smith did not use the man's name because he had been requested to withhold it. Smith told Erwin that there was a pay-off and vice conditions were being talked about all up and down the street.

Erwin told Smith he would investigate the matter. (31). About two days later Smith had a conversation with Erwin in Erwin's office. Erwin acted very upset and he informed Smith that he felt that Smith had talked to people that he should not have talked to and had said something that he should not have said pertaining to the Department and his particular affairs. (Smith's testimony 32).

A meeting was then arranged between Erwin, Finch, Holt and Smith. At this conversation Smith asked Holt to relate the conversation that he had had with him in Taggart's office; he was asked to give the gist of this conversation. Holt said that he had informed Smith of the vice conditions, etc., and that he had called Smith over because the information should be given to Erwin and that Holt also asked Smith to withhold his name when he gave Erwin the information. Holt said that there was a pay-off going on from the houses of prostitution and gambling houses and other vice conditions; that it was rampant all over town. That nearly everyone knew about it up and down Main Street and Holt stated he had informed Smith of that fact. After Holt was through with his conversation, which was rather brief and was to the same effect as Smith had previously told the Mayor, Smith asked Erwin again if there was any misunderstanding; if they were satisfied with what Holt had said and if it was alright, and there was no further remark. Finch made the remark that they should not be washing their dirty linen in the enemy's camp. (31 and 32). Holt's version of this conversation was that he stated therein that he had heard a pay-off was going on and that "they were accused of participating in it." (98). The day after this conversation, Holt had a conversation with Finch in which Finch told him to close every-

thing up, "Just close the town up." After this conversation with Finch, Holt went all around town to the places of prostitution, gambling places and lotteries and gave them orders to close up. Holt testified that it appeared to him that they were closed up "through about the month of July" (99).

Smith was released as secretary to the Mayor about July 1, 1936. On or about July 3, 1936 in Ben Hunsaker's field in Box Elder County, Erwin appeared. He had \$200 in currency. He offered Hunsaker the money as payment on the note and Hunsaker told him that he needn't have come up and that Erwin knew that Mr. Lowe, Hunsaker's attorney, was the man he should have paid it to because Lowe had written Erwin and declared the whole note due. (The note which was introduced as evidence called for the first payment on May 15, 1936 and Erwin had not made such payment). Hunsaker stated that he was not going to take this payment because it was up to Mr. Lowe to settle it. Erwin stated that he had had one hell-of-a-time down there getting things lined up and that he didn't think Hunsaker would mind for a short time. Hunsaker told him that when the note was made he had told Erwin he was not going to play around and that he expected the payments would be made on the due dates. Erwin stated that he had been having a lot of trouble and only had a few gambling joints and a few bootlegging places running. Erwin stated that he was then getting the women of the underworld pretty well lined up and that he expected quite a lot of money to be coming in. Erwin told Hunsaker that if he would take this money, he would promise Hunsaker that he would not be behind another time and that he would make payments when due. Hunsaker again told him that when the note was made out he had wanted him

to figure paying it out of his salary and that there was nobody to blame but himself. Hunsaker said, "Now you come to me and say that you have had a hell-of-a-time to make your collections from the different joints and there is nobody to blame but yourself." (82, and Sup. Ab. 11).

During the latter part of July, Holt had a conversation with Finch in Finch's office. At that time Finch mentioned Mr. Rosenblum and told Holt to go and see him. Nothing was said about the places of vice. Holt went to see Abe Rosenblum and Rosenblum told him to go and collect from the women. He told Holt the places that were operating and the amounts to collect. Before Holt made the collections he talked with the operators of the places of prostitution. He told them what was expected of them and told them he would be around about the first of each month. He further told them the payments they were to make; gave them certain amounts he was going to collect from them. Rosenblum had given him these amounts. Holt started to make the collections about the first of August. Holt named the houses of prostitution which he visited at this time and which are mentioned in the Bill of Particulars, giving their names and addresses. Holt stated that he collected from these places from the first of August until the first of January, 1937, on about the first of each month. He stated that he collected \$125.00 from Sadie Alder's place, \$125.00 from Kitty Spiegel's place, \$100.00 from Tillie Allen's place, \$50.00 from Margaret Newman's place and named the various amounts from other places.

About the first of August and after his conversation with Rosenblum, Holt had a conversation with

Finch. Finch stated that the heat was over and to let them reopen and not to let them run too openly. No specific places were mentioned. Holt testified that after that time he just let them run up until the first of January with the exception of the lotteries. (99 and 100).

After the places had been permitted to open up, Finch had a conversation with Holt in which Finch stated that Ben Harmon was making complaints about Abe Rosenblum's place, and Finch said that he didn't see what Ben Harmon had against him. Either in this conversation, or one just shortly after it, Finch told Holt that they couldn't tolerate Abe's place, and that Holt was to put a man there and to keep him there to see that they didn't indulge in infractions of the law. This was along the latter part of August or first of September. The place wasn't opened up any more by Abe Rosenblum that Holt knew of. Some other fellow opened it up. This conversation was not in connection with the closing up of any other place. This place had the reputation of being a gambling place, and it was a licensed card room. This was during the time that Holt was making collections and taking the money to Abe Rosenblum.

Some time in the later summer or fall of 1936, and at the time Erwin was making a payment to Hunsaker in Ogden, another conversation was had between them. It might be well to point out that Erwin made trips to Ogden to make the payments on the Hunsaker note, and in each instance, except one, the payment was made in currency. In this conversation Hunsaker asked Erwin why he didn't sit down and write out a check and mail it to him. Hunsaker said that then Erwin wouldn't have to come up, and Hunsaker wouldn't even have

to answer, and that the check would answer as a receipt. Hunsaker pointed out that this would save Erwin a trip, and also pointed out that Hunsaker was not home all the time. Erwin stated, "You don't think I am crazy enough to take two hundred dollars in currency and take it to the bank and get a check for it each month? I don't intend to let those fellows know what I am doing. I don't mind the trip up here at all. I will take care of paying the note in my own way." (84).

About the month of October, 1936, Early had a conversation with Erwin in which he stated to Erwin that there were rumors of a vice pay-off, and at this time the Mayor said that the matter was in the jurisdiction of the Chief of Police, and that the Chief of Police was operating the Department. (27).

Along in the fall or winter of this same year A. M. J. Pritchard talked with Erwin. Pritchard was the sexton at the City Cemetery. Before holding that position he had been a detective, and was appointed sexton on April 1, 1936. He knew Erwin and used to bring plants down to his office, and would go in and pass the time of day. At this mentioned conversation he told Erwin that there was a pay-off in town, and that the Women's Organization had a list of all the pay-off — the names of the parties paying off, and the amount they were paying. He stated that these organizations were going to have a meeting in two weeks and give it to the papers. Erwin asked Pritchard if he could get him a copy of that list. About three days later Pritchard brought him a full copy of the list of the names of the people that were supposed to be paying off, their addresses, and the amount they were paying. Erwin stated that it was unbelievable. Erwin never mentioned the matter to

Pritchard after that, although Pritchard had been in his office a number of times since then. (72, 73).

On another occasion in the latter part of 1936 at Mr. Hunsaker's home, Mr. Erwin had paid Mrs. Hunsaker the \$200 payment. Ben Hunsaker came into the house and he and Erwin had another conversation. Erwin asked Hunsaker whether he was making a report on his income of this \$200 a month that he was paying Hunsaker. Hunsaker stated that he was not; that it was merely a repayment of an old account. Erwin stated that he thought that if Hunsaker were reporting it that he would have to report it, "but being as you are not, I will not have to report it." Hunsaker told him that he had better go straight with Uncle Sam and the State, and Erwin said, "Well, I won't have to report it."

At another occasion in the latter part of 1936 at Hunsaker's home in Ogden Erwin made another payment. He had two hundred dollars in currency, handed it to Hunsaker and Hunsaker signed the receipt. Erwin on this occasion stated that he had his Chief of Police in there, that he was bringing him in very good money, but not enough; that if he had got the financial end of the city he would have been taking plenty of money. Hunsaker said, "E. B., they are going to get you as sure as hell." Erwin replied, "They can't get me. Somebody has got to see me take the money. They have got to prove I take the money, and they can't do that because I don't collect. Finch is the man they will get, but I don't think they'll be able to get Finch because he doesn't do the collecting himself. He has his men collecting for him." (83).

About the month of January, 1937, Mrs. Earl Van Cott, Mrs. Lee Wright, and Mrs. W. T. Runzler called on Erwin. At that time Mrs. Runzler was the State Director representing the Salt Lake Dis-

strict in the Utah Federation of Women's Clubs. Mrs. Van Cott acted as spokesman for the group and stated "that according to information she had received it was charged that Mr. Erwin was receiving a pay-off of \$750 a month, and the Chief \$350, and other operators of gambling establishments \$250." Erwin flushed considerably and stated, "Oh, I am accused of that too, am I?" Erwin then took a cigarette and asked if he might smoke. None of the ladies present said anything after he asked if he might smoke; they had no objection and Erwin changed the subject to parking meters. (73, 74).

Around the middle of January, 1937, Holt had another conversation with Finch. Finch told Holt to close everything up, that he was going to give Holt another man on the squad, and he also told Holt to see that there was absolutely no *more* pay-off. (100).

Some time before the 1937 licenses were to be issued, according to Finch, (177) because they had had trouble with card clubs, he told Holt to tell these people that they had had more or less complaints and arrests. Holt suggested that Finch call them in. There were ten or fifteen of them, and so far as Finch knew, all of them. Finch told them that he had had more or less trouble and that he wanted it definitely understood that when he okeyed these licenses they would run their places according to law. Finch did all the talking and the applicants did not say or do anything.

Close to the middle of February, 1937, Holt had another conversation with Finch. Finch told Holt that he thought Holt was the one who was making the town too hot, and that if he moved Holt things would calm down. (10).

Holt was removed the first of March by Chief

Finch, and H. K. Record was put in his place as Chief of the Anti-Vice Squad. (100).

Holt was promoted by Finch to the ranking of detective.

In connection with this shift on the Anti-Vice Squad, Finch testified (177) that there had been a good deal of complaints, "and the newspapers were riding us over the Women's Clubs." Finch thought it was advisable to make a change, and he told Holt he was going to make it. Also, according to Finch (181), after he removed Holt from the Anti-Vice Squad, the Women's Organization which had been taking quite an active part in vice conditions came to Finch and wanted to know why he had removed Holt. They felt that Holt was doing a good job. They stated they had never made complaints or words to that effect, and felt that Finch had made a mistake in taking Holt off the Vice Squad.

As pointed out above, the removal of Holt and the placing of H. K. Record on the Vice Squad took place the first of March. Around the middle of April and while H. K. Record was Chief of the Vice Squad, R. O. Pearce called Record on the telephone and asked Record to come over to his office in the Continental Bank Building. On his arrival at the office Mr. Pearce and Ben Harmon were there. Pearce told Record that he had been responsible for having him placed as head of the Vice-Squad and that Erwin had instructed him, Pearce, to make collections from gambling houses, *and other forms of vice*. Record asked them how much they wanted, expected to get, and Pearce replied, \$1700 a month. Record then asked Pearce where he expected to get that much, and Pearce stated, "\$600 from the lotteries. \$600 from the book-makers, and \$400 from the card rooms." Record told Pearce that he wouldn't be a party to a thing

of that kind. Pearce replied, "Alright, if you will string along with us, keep things in line, I will give you \$165 a month of it." Record told him that he didn't want to be a party to such a thing, and Pearce said, "Alright, we will get somebody else to handle it." (96).

Some time in the latter part of April, 1937, Holt went to see Ben Harmon at the Mint, 27 East Second South. Harmon stated to Holt that he was going to put Holt back on the Vice Squad. He told Holt that he would work under Captain Thacker; that Thacker was going to be head of it. At the time of this conversation Holt hadn't heard from Finch. (101).

On the first of May Finch again reorganized the Anti-Vice Squad, removed Record, made Captain Thacker the head of the Vice Squad and placed Holt under him. During the first few days of May Holt had a conversation with Thacker at the police station. Thacker told Holt he was to take charge of the prostitution, and that he, Thacker, would take charge of the gambling. (101, 102).

About a week or ten days later, and in May of 1937 Ben Harmon called Holt on the telephone and told him to come over. Harmon told Holt that he wanted him to collect from the places of prostitution, and told Holt the amounts to collect. He wanted Holt to pick up the money on the first of the month. Harmon then named the places of prostitution which were substantially the same as those mentioned to Holt by Abe Rosenblum, and after naming the places Harmon told him that these were the places from which collections should be made.

Dar Kempner had known Abe Stubeck for about eight or nine years. In March or April, it "might have been a little earlier or a little later," Kempner saw Stubeck at Stubeck's place of business

which is under the Politz Cafe at Second South and Main Street. It was a pool hall and card room. Kempner had a conversation there with Stubeck. It was somewhere in the neighborhood of three o'clock in the afternoon. After this conversation Stubeck and Kempner went straight down Main Street to the Ace Billiards, located at 248 South Main Street. Kempner went in the Ace Billiards with Stubeck, and Stubeck went up to a man that was racking pool balls on the pool tables, and asked that man if he had the money ready. This man stated that he didn't have quite all of it. Stubeck then said, "You had better get it in a hurry or you know the result." This man left the place and said, "I will be back right away," and he left the pool hall. When he came back he had some currency in his hands. Stubeck just said, "Alright," and put the money in his pocket. They then went out on to Main Street, and went to the Peter Pan, located at 222 South Main Street. Stubeck and Kempner went down stairs and Kempner went to the fountain and got a coca-cola. Stubeck went into the card room. Stubeck spoke to several men in the card room and when he came out he said, "Come on, let's go." As Stubeck and Kempner came upstairs from the Peter Pan, Stubeck took some currency out of his right pocket, then took some out of his left pocket, and put both packages of the currency together and folded them and put it all back in his other pocket. At that time Stubeck told Kempner that all card games were paying off, and that some of them were trying to chisel by trying to give him less money than they should do. Kempner asked him who was paying off, and Stubeck said all card clubs are paying off. Kempner then said, "Well, what's the matter? Who gets this money?" and Stubeck said, "Well, I take it

over to Ben Harmon's place." Kempner asked, "Well, does Ben Harmon get that money?" Stubeck replied, "Well, he splits it with Erwin and his crowd." These two then went to another card club on East Second South which was in the close vicinity of the Wilson Hotel. The two of them entered this place and Stubeck walked up and started talking to a fellow and Kempner stood there watching some of the fellows playing cards. From the Wilson Card Room Kempner and Stubeck went across the street to the Mint. As they went in Kempner saw Ben Harmon. Stubeck took the money out of his pocket, and just as he did that Harmon said, "Hello, Abe." Harmon was standing perhaps six or eight feet from Stubeck and Kempner. Stubeck replied, "Hello, Harmon," and took the money out of his pocket and laid it on the counter by the cashier. The man by the cash register picked the money up and put it under the counter.

About a month after this occurrence Kempner went on another trip with Stubeck, but they just stopped at the one place, the Ace Billiards.

On the first of June, 1937, Holt went around to the various places of prostitution mentioned in the Bill of Particulars, and collected sums of money similar to those he had collected in 1936. He took this money to Mr. Harmon at the Mint and Harmon told him to take it to Pearce's office. This latter happened about the third or fourth of June. That same day Holt saw Harmon in the Continental Bank Building in Mr. Pearce's office around six o'clock. When Holt got to that office, Mr. Harmon and Mr. Pearce were there. The door was open and Holt entered the lobby of the office and Pearce told him to come in. Holt laid the money on Pearce's desk and Pearce asked him if that was all of it. Holt replied that it was. Pearce then picked

up the money and put it in the drawer on the left hand side of his desk. Pearce was sitting behind the desk, and Harmon was sitting in a chair to the left of it about six feet from Pearce. There was about \$500 in currency. Holt continued to make collections from all of these places of prostitution on the first of each month up until January 1, 1938. After this June collection, the money was delivered to Ben Harmon, and in one or two instances amounts were changed, and new places for collections added.

In the middle of the summer of 1937 at Ben Hunsaker's home Erwin told Hunsaker that things had tightened up and he was having a hard time, especially with the Women's Betterment League in Salt Lake. He stated that they were after him and were giving him a lot of trouble. (85).

About the 25th of August, 1937, O. B. Record and Officer Burt made an arrest in the basement of the Atlas Building. Record did not know at that time who operated this place, but at the time of testifying he stated that he knew that Bill Browning had operated it. He and Officer Burt were in full uniform. His attention was called to this place when he saw people going down and coming out of the basement. When he went down he saw around fifty to seventy men in the basement "horse racing." He saw horse racing sheets tacked upon the partitions, four or five tables with horse racing sheets upon them, and some money on the tables. There was a blackboard there with twenty or thirty sheets on it. He got two fellows, the keepers, and Burt got two tables. This arrest took place about 1 P. M. No attention was paid to Record or Burt until they got inside the building and the arrests were made then. Record and Sergeant Pearce, a

police officer, made an arrest in the basement of the New Grand Hotel of some bookmakers at 32 East Fourth South. About the 30th of August, O. B. Record had a conversation with Finch and Finch asked him if he had complaints about these particular places which he had arrested, and Record said that he didn't. Finch then suggested that he let Thacker handle the arrests and not to interfere; that if there were any complaints of gambling to let Thacker know or Finch, and he would see that it was taken care of or these places taken care of. (15, 16).

In the latter part of the summer of 1937 Erwin had another conversation with Hunsaker in Ogden on the occasion of another payment in currency by Erwin to Hunsaker. Erwin said that he thought the Chief of Police was taking in a lot of money, but that he didn't know whether he was getting his right split. Erwin stated that he couldn't go down to Finch's office, watching him, knowing what he was doing, and also tending his own office at the same time, and Erwin stated, "I have to take just what he hands me and be satisfied." (83).

About the latter part of September or the first part of October, 1937, Holt had another conversation with Harmon. Harmon called him on the telephone and after this conversation Holt went to the Mint and there saw Harmon. He told Holt that Pearce had accused him (Holt) of holding out on him, and Harmon told Holt to go to Pearce's office and see him. Holt went there and no one was there but Pearce. Pearce had a slip of paper with a list of places on it, and Pearce asked him the amounts he had been collecting from the different places of prostitution. Pearce had some other addresses

and asked Holt why there was no collection made at these places. Holt told him that these other addresses were residences, and that the girls weren't making a living out of it, and Holt told him that he wouldn't collect from them. After they had talked a while Pearce said that it was alright, and that he thought Holt was doing a fine job and Holt left. (103, 104).

During the summer of 1937 and in the fall of that year, Early had conversation with both Erwin and Finch, in which he stated to them that there were rumors of a vice pay-off. Both of them asserted that they had not heard anything about it, Finch saying there had been no reports from the Department. In connection with these conversations and the others which Early had had with Finch and Erwin, he had advised them that they were involved. However, in the summer of 1937 nothing was said as to who was involved when Early talked to Erwin. (27, 28).

D. L. Hays, about November, 1937, had a conversation with Finch in Finch's office. Hays said to Finch, "You must know that gambling is going on in these places, either under protection or without regard to law." Finch stated "Yes, I know that gambling is going on here." Hays then asked him what he was going to do about it and Finch replied that he was not going to do anything about it.

In December of 1937, in a conversation with Hunsaker, Erwin stated that if Hunsaker pressed him for this money he would take bankruptcy, and on this occasion Erwin also said that if they got hot on his trail because of the things he was doing in Salt Lake, he would resign as Mayor. This conversation was on the last occasion of Mr. Erwin

paying Hunsaker in currency on the note heretofore mentioned.

Also in a conversation with Hunsaker in December, Erwin stated that he didn't think any of the commissioners were getting any money; that he didn't think Finch was getting anything, and he stated, "I don't think I am getting anything myself." Erwin also stated at that time that he didn't think that at that time there was any graft going on in Salt Lake City. (89, 91, 92).

The testimony of Hunsaker also was to the effect that Erwin, during every month from July of 1936 to December of 1937, traveled to Ogden to make the \$200.00 payments on the note, and these payments were made in currency on each occasion.

E. A. Hedman was Captain of Police and in charge of the Detective Bureau at the Police Station during the years 1936 and 1937. Soon after Christmas of 1937, Captain Hedman was called to Finch's office. When he arrived Finch, Thacker, O. B. Record, and another officer were there. Finch stated that Mr. Thacker seemed to have a grievance. Thacker said that he wanted to know why Hedman had ordered a raid on a gambling place at an address West on Fourth South. Hedman replied that he hadn't ordered the raid but that it had been made by the Detective Bureau, but couldn't see what difference it made who ordered the raid. Thacker then replied that he had to know about these raids. Hedman then wanted to know what Thacker expected him to do. Thacker told him to write it down and leave it on his desk; that is, any information relative to gambling. Hedman stated, "What if the condition comes up such as this came up, that you weren't here? The nature

of it was that it had to be taken care of immediately. What will I do then?" Thacker replied, "You still put it in an envelope and leave it on my desk and I will take care of it." Hedman then told him that if there were a robbery or burglary going on he wanted Thacker to take care of it, and Thacker replied that that was a different matter. All during this conversation, Finch didn't say anything at all.

Holt had a conversation with Ben Harmon about the 20th of December, 1937, and Harmon wanted Holt to collect from Sally Bennett at 123 West Third South, which was a house of prostitution. Holt told him that he thought he had enough to do, and that he didn't want to collect from there. Harmon told him that he would get somebody else to do it.

At this point it might be well to point out the fact that the witnesses, D. L. Hays, William Scott, and Henry V. Gosling testified that during practically all of the years of 1936 and 1937, gambling places were running wide open. The witness Hays described the operation of the card rooms known as the Pastime Club, Bank Smoke Shop, Wilson Card Room, Peter Pan, The Horseshoe, The Mint, Abe Stubeck's place, and the Ace Billiards. This witness testified as to the method of operation, stating that there was generally a man with a money apron on in these places and that chips were bought from him, and after a player was through, he would cash them in and receive the money for them. He testified that no identification cards were ever required for admittance to these places.

William Scott testified to the operation of certain dice games, one located at 35½ West Second South. He told of an incident in 1937 in which Thacker went into this place while the game was in opera-

tion and the players continued to play. He also testified to seeing gambling conducted at The Mint. Scott testified to visiting the basement of the Atlas Building in the spring of 1937; that he there saw equipment apparently used for horse race betting, heard announcements over the loud-speaker of different races at different tracks; that he saw betting and described the operations there rather fully. H testified that all of these places were running wide open and that it required no identification card for admittance.

The witnesses Margaret Newman and Sadie Alder testified to conducting houses of prostitution here in Salt Lake City. They also testified to making payments to Officer Holt. Bobbie Carlton testified to serving as an inmate in various houses of prostitution during the year 1937.

Holt also testified that all these houses which were mentioned in the Bill of Particulars furnished by the State had the reputation of being houses of prostitution.

It should be kept in mind by the Court that all of these illegal activities were being conducted in Salt Lake City in the manner described by these witnesses while the defendants were performing the acts and making the declarations heretofore related. Also attention is here called to the fact that Fisher Harris, who was the City Attorney for Salt Lake City, commencing about in August, 1937 was conducting an investigation in which he visited lotteries, card games, and other places of vice.

Returning to the chronological statement of facts, Holt testified that he made the rounds of the houses of prostitution on January 1, 1938, and turned over the proceeds to Ben Harmon. Around about the 10th of January, 1938, Fisher Harris

called Pearce for a meeting in Harold B. Lee's office. A conversation ensued at which were present Fisher Harris, Pearce and Lee. After some inconsequential or preliminary matters of greeting, etc., Harris said, "Mr. Pearce, I have been making an investigation of the illegal activities in Salt Lake City and the official connection with them and the pay-off that I have found existed." Harris further told him that he had made an investigation and had found certain illegal activities and a pay-off situation. He then told Pearce that he knew of his relationship with it and told Pearce that the principal thing he was interested in was the official connection with this situation; that is, the persons in the official body of the city who were connected with it. He then told Pearce that he knew of his relation with this situation; that he was involved in it with Mr. Harmon and others and that he thought it would be to his interest to make a full and complete disclosure of all he knew about it. When Harris first said this Mr. Pearce sat there and said nothing; "he sat there licking his lips." He did this for two or three minutes or more and then ultimately said, "Who says I am involved in this thing?" Harris said, "Dick, I am not at liberty to tell you precisely, but I will tell you the names of some of the persons who say you are involved." Harris went on to enumerate the names of about 15 different persons, and among them and about in the middle of those mentioned, was the name of H. K. Record. Pearce said, "Well, Mr. Record might say this about me because he has it in for me." Harris then pointed out to Pearce that he had not said that H. K. Record was one of them and asked Pearce why he picked him out. Pearce stated that it was because he had it in for him.

Pearce then said "Well, maybe I can help you stop this pay-off situation." Harris wanted to know how he could do this, and Pearce said that he could do it by talking to Ben Harmon; that he was his attorney. Harris then asked Pearce not to speak to Ben Harmon about this conversation. (142, 143).

Around about the middle of January, 1938, Harmon called Holt on the telephone and asked him to pick him up on First South and Regent Street. Holt picked him up at the appointed place and Harmon asked him to drive over to the west side of town, which Holt did. Out along 4th or 5th North and down by the Union Pacific tracks, Holt stopped the automobile and parked there for a minute. Harmon said, "For God's sake, don't take any more collections whatever, because Mr. Harris and Mr. Lee have got hold of Mr. Pearce and accused him of being in the pay-off. For God's sake, see that there is no more of it. Don't take anything from anybody because it might blow over." (121-123).

The day after the conversation between Pearce and Harris, Harris called Pearce on the telephone and said, "Dick, I am sorry you have taken the attitude that you have in regard to this thing. You may think it is clever to say nothing, but I think it is not to your interest to take that attitude. I think you ought to make a full and complete disclosure." Pearce replied, "Why should I talk to you?" Harris said, "Because if you don't, you are going to be indicted as sure as hell." Pearce then said he would call Harris in the next day or two. A few days after this, Pearce not having called, Harris called him again and Pearce said, "I told

you I would talk to you about it. I will talk to you some other time."

At about this same time, Fisher Harris had a conversation with Frank Thacker. This conversation with Thacker was limited to the defendant present and will not be here set out, although it becomes important in one of the assignments of misconduct made by the defendants. On the same day of the conversation with Thacker, Harris also had a talk with Finch. Finch telephoned Harris and told him that he understood that Harris had been accusing him of all sorts of crookedness, and an appointment was made for 2 o'clock in the afternoon on that same day. At the appointed time Finch appeared in Harris' office and stated that he understood Harris had accused Thacker of all sorts of crookedness. Harris replied that he had told Mr. Thacker that there was all kinds of illegal activities in operation running in Salt Lake City, in connivance with the Police Department. Finch replied that he thought the town was being run pretty well. Harris told him that he wouldn't have any argument with him on matters of judgment as to how the town should be run, but he did not think anybody would claim that public officials should personally profit from illegal activities. Finch replied that for the last 30 years he had been hearing stories about pay-off in Salt Lake City, and didn't know how to prevent such stories. Harris stated, "Harry, in regard to that, maybe the least that anyone can do, or maybe the most, is to see that those stories are not true, but in this case the stories are true and public officials are profiting from illegal activities in Salt Lake City." Harris then went on to enumerate the illegal activities which were being carried on, including dice games, pool games, houses of prostitution, bookmaking

establishments and Chinese lotteries. Finch replied that he didn't see how anything of that sort could be done. He told Harris that they had collected \$2,000 in fines from gambling in Salt Lake City during the past year. Harris replied, "Mr. Finch, one man pays graft protection money of \$3,600 a year, one man alone, and you talk about getting \$2,000 for Salt Lake City. Here is one group of people who pay \$6,000 a year for protection money and you talk about getting \$2,000 for Salt Lake City. Here is another group that pays \$7,200 a year. Here are card rooms — I haven't figured it up exactly — but they pay thousands of dollars, a year; and here are the prostitution houses paying thousands of dollars a year, and you talk about getting \$2,000 for Salt Lake City, when all this money is going into the hands of public officials and people interested in them in the underworld." Mr. Finch replied that he thought the town was run pretty well and that was about all of that conversation. Mr. Finch did not at any time ask the name of any person involved and did not ask Harris to give him the name of any person that was involved during any of this conversation. (135-137).

On January 15, 1938, Harris prepared and delivered to Erwin's office a letter which was marked Exhibit R, but because of the objection of the defendants this letter was not admitted in evidence and was not read to the jury. January 15th was on a Saturday and the letter was delivered at about 12 o'clock. About 1 or 2 o'clock that afternoon, Erwin called Harris by phone and stated that he had received the letter which had been left at his office and that it presented an interesting situation; that he had never heard anything like that before. Erwin said that perhaps they should discuss the

letter, and Harris replied that he would be glad to confer with Erwin at any time. Erwin fixed the meeting at 1:30 on Monday and Harris said he would be there. At this meeting on Monday, January 17th, certain routine matters of city business were discussed, and finally Erwin said, "Now, about this letter of yours. You say all these places are operating." Harris replied that there was no doubt about it. Erwin then asked if Harris thought they ought to pay Salt Lake City for the privilege of operating. Harris replied that he did not, but that if they were permitted to operate at all, and if anything was paid on account of them, he would suppose that the amount should be paid to Salt Lake City as a part of the expense of their regulation. Erwin then asked what Harris supposed they should pay in that event. At that time the letter was in front of them.

Harris pointed out that the lotteries then paid \$500.00 a month protection money and that he would assume they would be willing to pay something less than that, and he named some figure less than \$500.00. He then pointed out that the bookmakers were then paying \$600.00 a month and that he supposed they would be willing to pay \$500.00. Harris next enumerated the card rooms and said that they were paying from \$50.00 to \$100.00 a month each, and that the houses of prostitution were paying from \$50.00 to \$125.00 a month, and that the dice games were then paying \$300.00 a month. He enumerated all of the illegal activities which were mentioned in his letter. As he was enumerating these various places and these various amounts, the Mayor was making notations in pencil on the letter. After completing this

enumeration Erwin stated that these amounts came to \$19,000 as Harris remembered it. Erwin said, "They say all these people pay off?" Harris replied, "Yes," and Erwin said, "You don't say." Erwin then wanted to know if Harris thought it would be right if he should ask the Chief of Police, Mr. Finch, to hereafter collect the amounts from each of these places which Harris had mentioned. Harris replied that he didn't believe that anybody who knew anything about the work he had done which had resulted in this report would be willing to have Finch continue in office, and Erwin said as he left, "Well, we will talk about that some other time." During this conversation Erwin did not at any time inquire as to who ultimately received this money and did not ask Harris where he had obtained the information.

On January 18th Erwin appeared in Harris' office and said, "There were questions I ought to have asked you yesterday." Harris told him that he would be glad to answer any question which he cared to ask him concerning the matter of this discussion. Erwin then stated, "You say in your letter that you know who collects this money, this pay-off." Harris replied that he did, and Erwin asked who it was. Harris then enumerated certain names and Erwin made some notations in a little notebook which he had. As Erwin started to leave, he said, "You say all these places pay off, pay protection money?" Harris told him there was no question about that at all, and Erwin replied, "Well, they wouldn't feel natural if they weren't paying off to somebody, and what difference does it make who gets it?" Erwin left the office. In this conversation Erwin did not ask who ultimately got the pay-off. (130, 131).

On January 20, 1938, a conference was held at the Alta Club, at which were present Finch, Erwin,

H. B. Heal, editor of the Salt Lake Tribune, LeRoy Bourne, editor of the Salt Lake Telegram, Mr. A. L. Fish, newspaper man, and Fisher Harris. Harris was the last to arrive and he arrived there at about 2 o'clock. All of the other gentlemen were seated at a table about three feet in width and six or seven feet long. Mr. Fish sat at one end of the table and Mr. Erwin at the other. Harris sat at the corner of the table by Fish. Bourne was on Harris' right, Heal was at Erwin's right, and Finch was on the other side of the table from the corner where Harris sat. Mr. Fish stated that he had heard rumors of an investigation made in regard to underworld activities and official corruption relating to them, and he demanded to know what it was all about. He made this demand particularly upon Harris and asked him if he had made such investigation. Harris answered that he had and that he had made a complete report of the matter to Erwin in writing.

Fish then asked Harris if he knew what illegal activities were in operation and he said that he did. He asked Harris to enumerate them, and Harris did, enumerating those places which have heretofore been mentioned in the conversations of Harris, giving the amount that each kind of activity paid. Fish then asked, "Do you know who gets this money and to whom it is finally distributed?" Harris replied that he knew and upon being asked who it was, replied, "E. B. Erwin gets \$750.00 a month; Harry Finch gets \$500.00 per month, the amount collected." At this time Finch and Erwin were both at the table, Finch being about two and one-half feet distant and Erwin five feet from Harris. Neither one of them said anything at the time this statement was made. At various times during the conversation both Erwin and Finch remarked that this was the first time they had ever

heard of any pay-off situation in Salt Lake City. After Mr. Finch had said this at least three times, Harris turned to him and said, "Harry, don't say that again." Finch said, "Why not?" And Harris replied, "Because it isn't so." Mr. Erwin suggested that Finch should resign and Finch said that he would resign the next day.

During this conversation Fish asked Harris how long this situation had been going on and Harris said to his knowledge that it had been going on since the last of 1937 and that it had been going on before that, but that was the scope of his then investigation. A suggestion came from Harris that Mr. Finch be allowed to resign under such circumstances; that it would not publicly appear that it was on account of these charges that he has just made. No one opposed the idea. (144 to 146).

From the testimony of Finch and O. B. Record, it is submitted that it can be safely said that after the meeting at the Alta Club, Finch returned to the Police Station and called in various persons, including Holt and Thacker, and asked them certain questions with a view of their being witnesses for Finch. On January 21st, Mr. Harris attended a meeting of the City Commission at which Erwin was present and the other City Commissioners, George B. Keyser, Pat Goggin and Mr. Murdoch. During this meeting Commissioner Keyser, at the time when they were discussing the subject matter of the letter, Exhibit R, said, "You received from the City Attorney several days ago a letter addressed to the Board of Commissioners in regard to this matter." Keyser demanded that Erwin produce this letter and Erwin thereupon produced it. This particular meeting was the fifth

meeting since the letter had been given to Erwin. (131 and 132).

On this same day Finch sent his attorney, Frederick C. Loofbourow to the City Commission to inform them that he, Finch would not resign. After being so informed the City Commission discharged Chief Finch and the following is contained in the minutes of the City Commission for January 21, 1938:

“Resolved that the good of the service will be subserved by the immediate removal from office of Harry L. Finch as Chief of Police of Salt Lake City; and accordingly Mr. Keyser moved that his employment as such be and is hereby terminated, effective this date, which motion carried; all members present voted ‘ayes’ except Mr. Erwin, who voted ‘nay’.” (Sup. 2).

On January 22, 1938 Mr. Erwin’s attorney, Ralph Stewart, delivered to Fisher Harris a letter signed by Erwin which was marked as Exhibit S and admitted in evidence. This letter was dated March 15, 1938 and was addressed to the Board of City Commissioners. It stated that Mrs. Erwin had been in ill health for some time, necessitating Erwin taking her on various occasions to California and that he could not devote his time to city business. It also stated that there had been a failure of harmony in the Commission and Erwin felt unable to contend with the problems of the Public Safety Department to which he was assigned and that his resignation and the appointment of some one else would result in more harmony and he hoped his successor would have the Commission’s support. This was a letter in which Erwin resigned as Mayor and City Commissioner. This

letter was not delivered to the City Commission, but was delivered to the City Recorder in a sealed envelope and put in the safe for Harris.

At a later date another resignation from Erwin was received by the City Commission. This letter was admitted in evidence and marked Exhibit T. It was dated February 5, 1938 at Los Angeles, California and was addressed to the City Commission and was signed by Erwin. This letter called attention to the fact that in his campaign the reorganization of the financial department was an issue. In this letter Erwin stated that his experience was along business lines of that kind and that if he had anticipated appointment to the Public Safety, he would not have sought election; that he had tried to avoid this appointment. He said that recognizing the rumors attendant on previous administrations in that department he had disregarded political pressure and selected Mr. Finch as a man well known to the Commission and recognized as above reproach and in whom he had confidence and felt that he could leave that department to those in charge and devote himself to other and more important problems of the city. He said that he had tried to procure reorganization so that he could be relieved of the department. That his services on the Commission had not been pleasant, but had been made difficult. He said that the Commission had abolished the office of manager and had removed the Chief and that he felt he should resign. Fisher Harris stated that he demanded the resignation of Mayor E. B. Erwin. (146 to 148).

The facts heretofore stated by counsel for the State are facts which appear in evidence and which the jury could have believed beyond a reasonable doubt. We have not presented in this statement of

fact much of the evidence which was introduced by the respective defendants. Such evidence would only create a conflict so far as the consideration of this case is concerned by this Court. The conflicts in evidence must be resolved in favor of the State.

Counsel for the State has not attempted to argue the inferences which might be drawn from the foregoing evidence and has not made a comparison between certain facts which would be helpful in determining the guilt of these defendants. As an example of this latter, we call attention to the fact that before Holt was discharged from the Anti-Vice Squad in March of 1937, Finch called him in and told him he was going to remove him. Also, in January, according to Finch he had told Holt of certain rumors about Holt to the effect that Holt had been collecting money. When it came to the discharge of H. K. Record from the Anti-Vice Squad, Finch stated that he had been told by a number of individuals that Record was interested in a dice game. Finch, however, in this instance, did not communicate with H. K. Record and advise him of these rumors or tell H. K. that he was going to remove him. Such notification only came from a notice which was posted on the Police Bulletin Board.

To look at one fact alone, one might say that it meant nothing, but when considered with the background of the other facts introduced in this case, Finch's actions with respect to the removal of these two men point to the fact that he was involved in the conspiracy alleged in the indictment.

Two briefs have been filed in this case by the defendants. One on behalf of the defendants Pearce and Finch, and the other on behalf of the defendant

Erwin. The matters contained in the two briefs are in most instances upon different subjects. Counsel for the State will attempt to meet each of the points raised by these briefs, starting with the questions relating to the pleadings, then the admissibility of evidence, then the sufficiency thereof, and then the claim of misconduct on the part of the State's attorneys.

STATEMENT OF POINTS INVOLVED

The State has followed very closely the subdivisions contained in the briefs of the defendants herein. The following is the order in which they are here presented :

1. The indictment in this case states facts sufficient to constitute a public offense, both under the common law and the statutes in this State previous to 1935, and also within the provisions of the Code of Criminal Procedure found in the Laws of Utah, 1935.
2. The Bill of Particulars.
3. Overt acts were alleged and proved.
4. Admissibility of Evidence.
 - (a) Classification No. 1.
 - (b) Classification No. 2.
 - (c) Classification No. 3.
 - (d) Classification No. 4.
5. The testimony of the accomplice Holt was sufficiently corroborated.
6. Even though evidence was admitted of

different and smaller conspiracies, no error was committed.

7. The doctrine of res judicata is not applicable to this case.

8. There were no improper statements or conduct of the District Attorney permitted or allowed, and even though such is found to exist they were not prejudicial error or reversible.

9. The court did not admit improper matters of evidence.

10. The court did not err in refusing requests and in giving certain instructions.

11. Sufficiency of the evidence.

12. In order to justify a reversal the error must actually prejudice the defendants.

I

THE INDICTMENT IN THIS CASE STATES FACTS SUFFICIENT TO CONSTITUTE A PUBLIC OFFENSE, BOTH UNDER THE COMMON LAW AND STATUTES IN THIS STATE, PREVIOUS TO 1935, AND ALSO WITHIN THE PROVISIONS OF THE CODE OF CRIMINAL PROCEDURE FOUND IN THE LAWS OF UTAH, 1935.

The indictment in this case was based upon the indictment found in the case of

People v. Tenerswicz, 266 Mich. 276; 253 N. W. 296. (1934).

A comparison of the two indictments will show that they follow each other very closely. In that case

the defendants on appeal contended that said indictment did not state a public offense and the court overruled such contention and upheld the sufficiency of the indictment. This indictment alleges a violation of

Section 103-11-1, Revised Statutes of Utah,
1933.

The material parts of which section provide:

“If two or more persons conspire: (1) To commit a crime or (5) To commit any act injurious to public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice or the due administration of the laws; -- they are punishable by imprisonment in the county jail not exceeding one year, or by fine not exceeding \$1,000.”

This indictment clearly alleges the violation of this statute. It alleges that the appealing defendants, together with Ben Harmon, Frank Thacker, and other persons to the Grand Jury unknown, conspired to permit, allow, assist and enable houses of ill-fame and lotteries, dice games, slot machines, book-making and other gambling devices, and games of chance to be kept, maintained and operated at various places in Salt Lake City, the defendants then and there knowing that such places were being kept, maintained and operated in Salt Lake City in violation of the statutes of the State of Utah and the Ordinances of Salt Lake City. This contains an allegation of the agreement between the defendants. Certainly no argument is necessary to sustain the proposition that they conspired to commit crimes and to commit acts injurious to public

morals and for the perversion or obstruction of justice or the due administration of the laws of the State of Utah.

We also respectfully call the attention of this Court to the provisions of

Section 105-21-S, Chapter 118, Laws of
Utah, 1935,

which provides that an indictment may charge, and is valid and sufficient if it charges the offense for which the defendant is being prosecuted by using the name given to the offense by the common law or by a statute, or by stating so much of the definition of the offense, either in terms of the common law or of the State defining the offense or in terms of substantially the same meaning, as is sufficient to give the court and the defendant notice of what is intended to be charged. This section further provides that the indictment may refer to a section or subsection of any statute creating the offense charged therein, and that in determining the validity or sufficiency of such information or indictment regard shall be had to such reference.

The indictment in the present case accuses the defendants of the crime of "Criminal Conspiracy in Violation of Title 103, Chapter 11, Section 1, Revised Statutes of Utah, 1933." See also reference to Section 105-21-47 of said Chapter 118, wherein certain forms are suggested and the statute provides that such forms may be used in cases in which they are applicable. The following is therein contained:

"Conspiracy --- A. B. and C. D. conspired together to murder E. F. (or to steal the

property of E. F. or to rob E. F., as the case may be).

In the case of

State v. Smith, 56 R. I. 168; 184 Atl. 494
(1936),

the defenants were convicted of conspiracy. The indictment in the case charged that the defendants on July 1, 1932 and on divers other dates between then and February 30, 1933 "did fraudulently and unlawfully conspire together to steal the property of the National Providence Worsted Mills, a Rhode Island corporation" Defendants contended that this indictment did not advise them of the nature and cause of the accusation against them and that it failed to charge any crime sufficient to enable them to plead their conviction or acquittal thereon as a defense to any subsequent prosecution. The statutes of Rhode Island in relation to criminal pleadings are similar to those found in the Laws of Utah, 1935, and they set out the identical suggested form for conspiracy. The defendants contended that this indictment and also the statutes violated rights secured to them by both the U. S. Constitution and the Constitution of the State of Rhode Island. The Rhode Island constitutional provisions are set forth and are similar to those found in the Utah Constitution. The Court upheld the sufficiency of the indictment and held that there was no constitutional violation either by the indictment or the statutes relating to criminal pleadings.

The Court recognized the power of the Legislature to change, modify or prescribe the forms or manner of stating a charge. The State Constitutional provisions require the nature and cause of the accusation and a sufficient identification thereof to prevent a subsequent prosecution. The court

points out that charging the defendants with conspiracy informs them of the nature of the crime and that alleging that they conspired to steal sufficiently sets forth the cause of the accusation, and points out that the great weight of authority is that an indictment need not set forth the object of the conspiracy with the particularity required when the indictment charges the commission of the crime. This Court also holds that where the object is unlawful, neither the means intended to accomplish the object of the conspiracy nor its successful accomplishment need be alleged.

Counsel for the State has been unable to find any case which holds the so-called short form indictment statutes unconstitutional or indictments complying therewith insufficient. See

People v. Brady, 272 Ill. 401; 112 N. E. 126; Ann. Cs. 1918 C. 540 (1916).

People v. Bogdanoff, 254 N.Y. 16; 171 N.E. 890; 69 A. L. R. 1378 (1930).

State v. Roy, 40 N. M. 397; 60 Pac. (2d) 646.

State v. Engler, 217 Iowa 138; 251 N. W. 88.

State v. Keturokis, 224 Iowa 491; 276 N. W. 600 (1937).

Hurd v. Commonwealth, 159 Va. 880; 165 S. E. 536.

Dealy v. United States, 152 U. S. 539; 38 L. Ed. 545; 14 Sup. Ct. 680 (1893).

State v. Continental Purchasing Company, Inc., 119 N. J. L. 257; 195 Atl. 827 (1938).

People v. Busiek, 32 Cal. App. (2d) 315; 89
Pac. (2d) 657 (1939).

State v. Domanski, 57 Rhode Island 500;
190 Atl. 854 (1937).

State v. Capaci, 179 La. 462; 143 So. 417.

Rosenberg v. State, 212 Wis. 434; 249 N. W.
541 (1933).

Counsel in no place points out any essential allegation which is not contained in the indictment and so we are left in the dark as to what it is that should have been alleged in the indictment, but was left out. In one place in their brief they indicate that the indictment contains no allegation of the means by which the defendants were to effect the object of the conspiracy. As pointed out in the Smith case above, and the following cases, it is clearly the law that the allegation of means is unnecessary under the facts as alleged in the present indictment.

Froberk v. United States, 249 U. S. 204;
63 L. Ed. 561; 39 Sup. Ct. 219 (1918).

Archer v. State, 145 Md. 128; 125 Atl. 744
(1924).

Commonwealth v. Donaghue, 250 Ky. 343;
63 S. W. (2d) 3 (1933).

People v. Schneider, 345 Ill. 410; 178 N. E.
84 (1931).

It is submitted that under the foregoing authorities that both under common law and under the short form indictment statute of this State, the indictment states a public offense, that is, an offense in violation of

Section 103-11-1, Revised Statutes of Utah,
1933.

II.

THE BILL OF PARTICULARS

No contention has been made by the State that the indictment was, or could be cured by the Bill of Particulars. The indictment in this case under the foregoing authorities was sufficient. The State also concedes that the Bill of Particulars is not a part of the indictment.

Section 105-21-9, Chapter 118, Laws of
Utah, 1935,

provides that upon demand of the defendant, the court may order the "prosecuting attorney" to furnish a Bill of Particulars. This procedure was followed in this case. Counsel states on Page 9 of the Erwin brief that the order that a Bill of Particulars be furnished was an admission on the part of the court and the State that the indictment was insufficient. A contention such as this can only be characterized as silly.

The conspiracy in this case was an agreement to enable and assist houses of prostitution and gambling games to be operated. The means that were to be used in effecting this conspiracy are not an essential element of the conspiracy charged, according to the authorities heretofore cited. Defendants, however, demand to know the means and that the State set them forth in the Bill of Particulars. Such Bill of Particulars did not attempt to aid the indictment by furnishing an essential allegation. It merely set forth evidence which the State would introduce to establish the commission of the crime of conspiracy as charged in the indictment.

The same thing may be said of the particularizing of the houses of ill-fame, gambling establishments and the names of those making collections. Allega-

tions of such evidence are not required to be in the indictment by any of the authorities which we have been able to find. The conspiracy alleged was not to enable a certain house or establishment to operate, but generally to permit all such houses or establishments to operate. The defendants desired to know what evidence the State would rely upon with respect to particular houses that were permitted to operate and upon order of the court, the State furnished such particulars. The State furnished particulars of the crime alleged in the indictment.

The position of the State is simply this: The indictment charged a conspiracy to enable and assist houses of ill-fame and gambling establishments to operate in violation of law and the Bill of Particulars particularized some of the evidence requested by the defendants, upon which the State would rely to prove the commission of the crime charged in the indictment. In the case of

People v. Bogdanoff, *supra*, the indictment merely alleged that the defendant committed the crime of murder. A Bill of Particulars was then furnished alleging the name of the victim and that he had been shot and killed by the defendant on a certain date in a certain county. The defendant contended that the attorney for the State could have charged any murder and could have proven a different crime than that contained in the indictment. It is submitted that the indictment in this case did away with any such contention. However, in the Bogdanoff case the Court held that it was apparent from the evidence that there was only one crime intended to be charged by the Grand Jury and that was the one set forth in the Bill of Particulars. The Court referred to the evidence in determining this case. In the case

at bar an examination of the evidence will show that the crime charged in the indictment, the particulars of which were set forth in the Bill of Particulars and of which evidence was introduced was one and the same crime and the only crime that the Grand Jury could have had in its mind. In

State v. Whitmore, 126 Ohio State 381;
185 N. E. 547 (1933),

the defendant contended that it was not the legislative intent to authorize a prosecuting attorney to provide a Bill of Particulars describing the offense and to permit the prosecutor to inject into the indictment allegations according to his "whim or caprice." It was held that such contention was groundless and that the accused could test the Bill of Particulars in connection with the indictment and that there was no possibility of the results which the defendant pointed out.

These cases cited by defendants in no way aid them in the contentions which they make. For instance, in

Wright v. People, 104 Colo. 335; 91 P.
(2d) 499 (1939),

a different offense was set out in the Bill of Particulars than that contained in the indictment and this difference was apparent upon the face of the two papers. In

People v. Westrup, 372 Ill. 517; 25 N. E.
(2d) 16 (1940),

the Court in making the statement set forth on Page 23 of Erwin's Brief was merely considering a variance between the evidence and the Bill of Particulars.

Defendants state on Page 25 of Erwin's Brief that other and different means than the failure to arrest

and enforce the laws may have been in the minds of the Grand Jury and that they may have had in mind that defendants enabled these places to operate by furnishing the operators with money, fixtures, buildings and customers. The simple answer to this is that the crime was for conspiring to enable these places to operate and if that is ultimately shown, the means used are entirely unessential and need not be contained in any pleadings. Also defendants claim that it was not stated in the indictment that Golden Holt and Ben Harmon aided in the making of collections. Of course, it was not. Such an allegation would merely have been an allegation of evidence which has never yet been required to be placed in an indictment. The Grand Jury in the indictment need only allege the crime committed and in the trial of the case any evidence which tends to prove that charge is admissible whether the Grand Jury knew of the particular evidence or not. If this were not so, before any evidence would be admissible against defendants it would be necessary to determine as a condition precedent to its admissibility that the Grand Jury had known of such evidence and had it in mind at the time the indictment was returned.

III.

OVERT ACTS WERE ALLEGED AND PROVED

In contending that the acts as alleged were not proper overt acts in this case, the defendants contend, first, that the overt acts must be separate and apart from the agreement and that the acts to enable houses to operate, was, if anything, a part of the agreement, and second, that the collection

of money from operators were not acts done to effect the object of the agreement.

In its final analysis, a conspiracy consists of the mental acts of two or more persons coming to an agreement. Keeping this in mind, it cannot be said that the agreement to permit houses of vice to operate is the same as permitting the houses of vice to operate. The agreement consists of the mental activities of the parties. The accomplishment of the object of the conspiracy may tend to prove the fact that there was an agreement, but its accomplishment is different from the agreement itself. It is well established that the overt acts alleged may be the accomplishment of the object of the conspiracy.

Liberato v. United States, 13 Fed. (2d) 564 (9th Circuit — 1926).

Allen v. United States, 89 Fed. (2d) 954 (4th Circuit — 1937).

This latter Court states:

“An overt act was necessary to complete the crime, but this overt act might be the very crime which was the object of the conspiracy. *United States v. Rabinowich*, 238 U. S. 78; 35 S. Ct. 682; 59 L. Ed. 1211; *Heike v. United States*, 227 U. S. 131; 33 S. Ct. 226; 57 L. Ed. 450; *Anno. Cases* 1914-C 128.”

Hence, the fact that the indictment alleged the accomplishment of the act, does not thereby invalidate it.

Cobb v. Corn, 242 Ky. 424; 46 S. W. (2d) 776 (1932).

In *People v. George*, 74 Cal. App. 440; 241 P. 97, (1925),

the Court discusses the rule mentioned by defendants herein and very clearly points out that an overt act only need be some act other than the mental activity of reaching an agreement. Overt acts may be and often are used in determining whether or not a conspiracy actually existed, and it may be that from a series of such overt acts an agreement may be inferred to exist.

Rich v. United States, 62 Fed. (2d) 638 (1st Circuit — 1933).

Safarik v. United States, 62 Fed. (2d) 892 (8th Circuit — 1933).

The Court in

Rich v. United States case, *supra*, states:

“It is further contended in effect that the overt acts, if proved, could not be considered as proof of the conspiracy. The presiding judge ruled that the doing of the overt acts alleged, or some of them, must be proved, that the acts if proved, might be considered on the question whether there was such a conspiracy as was charged. We think this was correct. An overt act is by definition something done in the cause of the conspiracy. The allegation of it as an overt act does not take it out of its place in the chain of evidential fact.”

The second contention of the defendants is that the collection of money is not in furtherance of the agreement, but in effect placed a tax upon the operation of these establishments of vice and would prevent them from operating. This contention overlooks the obvious. It is just common sense that in order for places of vice to operate under

the protection of public officials, some form of profit ordinarily is or must be made by the officials. The money is paid to the officials in order that they will not enforce the law and will not make arrests. In the case at bar money was paid by these establishments in order that the same could operate and the officials received such money upon the understanding that they would permit and enable these establishments to operate without hindrance. In

Cook v. United States, 28 Fed (2d) 730,
(1928),

the indictment charged that Cox, a Justice of the Peace, and Cook, a Constable, conspired with Jimerson to manufacture, transport and sell whiskey, that Cook and Cox conspired that Jimerson should manufacture and sell whiskey and beer on his farm and that Cox and Cook should afford Jimerson protection from criminal prosecution for manufacturing, transporting and selling such liquor and that Jimerson should pay \$40 per month to Cox and Cook for such protection. The indictment charged as the first overt act that Cox and Cook received \$10 from Jimerson on May 31, 1925 and as a second overt act, that on June 8, 1925, Cox and Cook received from Jimerson \$5 in accordance with said agreement. On appeal counsel for Cook contended that the indictment was insufficient because it failed to allege overt acts to effect the object of the conspiracy. The Court says:

“They say that the payment and receipt of the sums of money were a part of the agreement and conspiracy and were in no sense overt acts in furtherance of the object of the conspiracy.”

“It is true that this money was paid by Jimerson and received by Cox in compli-

ance with the unlawful agreement theretofore entered into by the co-conspirators, but such fact does not prevent it from being an act done to effect the object of the conspiracy. The unlawful agreement contemplated that Jimerson should perform the physical acts constituting a violation of the National Prohibition Act and that Cook and Cox should afford him protection from arrest and prosecution therefor and that Jimerson should pay Cox and Cook the sum of \$10 per week from the monies realized from the sale of the intoxicating liquor and from the dice game. It is our opinion that where an officer agrees to afford a person criminally inclined, protection from arrest and prosecution for the commission of crime, such officer is as much an actor in the commission of such crime physically committed by the person to whom the protection was afforded, as one who aids by standing guard while another physically commits a crime."

In *Hall v. United States*, 109 Fed. (2d) 976
(10th Circuit — 1940),

the defendants were charged with conspiracy to transport non-tax paid whiskey through the City of Hugo. The defendants are those who transported the whiskey and certain officers who permitted such whiskey to be transported. One of the overt acts was that a conspirator gave another \$10 with instructions to deliver the same to one of the officers in order to allow the giver to haul non-tax paid whiskey through the city. The Court held that this was properly an overt act and in furtherance of the conspiracy. The Court said:

" . . . If the act of a conspirator be done

with the purpose of putting an unlawful agreement into effect, it is sufficient although it has no tendency to accomplish its object.”

See also

Collier v. United States, 255 Fed. (2d) 328,
(5th Circuit — 1918).

In United States v. Manton, 107 Fed. (2d)
834 (2d Circuit — 1938),

the defendant was charged with the conspiracy to obstruct the administration of justice and to defraud the United States. Some of the overt acts alleged were the acceptance of money. The Court pointed out that the charge was not a conspiracy to accept and secure bribes, but that the bribes were only resorted to by way of consummation of the conspiracy. The same can here be said of the payment of the money by the operators of these establishments. Such money was paid in consummation of the conspiracy to enable them to operate.

It is well established that it is not necessary to allege in an indictment how or in what manner the overt acts contribute to the furtherance of the conspiracy.

Stevens v. United States, 41 Fed. (2d) 440,
(9th Circuit — 1930).

Heskett v. United States, 58 Fed. (2d) 897,
(9th Circuit — 1932).

Lefkowitz v. Schneider, 51 Fed. (2d) 685,
(3rd Circuit — 1931).

On page 30 of Erwin's Brief a contention is made that no overt act was proved and points out that the only money collected was collected by Abe Stu-

beck, Golden Holt, Abe Rosenblum, Ben Harmon and R. O. Pearce. All of these persons were members of this conspiracy and the act of collecting done by them if done in furtherance of the conspiracy as alleged was an act of all those persons who were members of the conspiracy and as such, constituted proof of some of the overt acts as alleged in the indictment. This brief further states that there was no proof that the money collected ever got into the hands of Erwin. Mr. Erwin stated to Mr. Hunsaker in Ogden that he was receiving money from the graft pay-off in Salt Lake City. This is certainly proof that Erwin received some of these monies so collected.

It is submitted that under the foregoing authorities and argument the overt acts alleged were acts which were separate and apart from the mental activities of the defendants in reaching an agreement and are acts which were in furtherance of the conspiracy, and that they were sufficiently proved by the evidence of Holt, Kempner, Hays, Scott, Sadie Alder, etc.

ADMISSIBILITY OF EVIDENCE

Counsel for the defendants, Finch and Pearce, has attempted to make a classification of the evidence introduced by the State, into four groups, contending, as we understand him, that this evidence was inadmissible and from the statements and quotations which he makes apparently confuses the rules of admissibility and the rules of sufficiency of evidence. From reading his brief, one comes to the conclusion that his contention is that before

a particular piece of evidence may be introduced it must be consistent with the defendant's guilt and inconsistent with his innocence. Such is not a rule of the admissibility of evidence. In

State v. Inlow, 44 Utah 485; 141 P. 530,
(1914),

the Court states the rule of admissibility:

"The rule respecting the admissibility and relevancy of evidence under circumstances like those in the case at bar is very clearly stated by Mr. Justice Straup in a case decided at this term and not yet published, namely, State v. Tidwell, 139 Pac. 863, in the following words: 'To be relevant and admissible, it is not essential that proffered evidence be by itself sufficient to establish a disputed point or fact in issue, nor is it required to be addressed with positive directness to such point or fact. It is receivable if it by itself, or in connection with other evidence, renders probable or improbable, or logically tends to prove or to disprove, a disputed point or fact in issue.'"

As pointed out by this Court, each isolated piece of evidence should not be taken alone in determining its admissibility, but when it is fitted into its proper background of facts introduced in evidence, and it then has some probative value, it is admissible. We will proceed with the discussion of the evidence as classified by counsel for Finch and Pearce, noting however that we do not believe that this classification is one which covers the evidence introduced in the trial of this case. Because we believe that this method will be more helpful to the Court, we have determined to follow this procedure.

CLASSIFICATION 1.

This classification relates to the testimony of the operation of the houses of prostitution, card games, bookmaking, lotteries and dice games as given by the witnesses, D. L. Hays, William Scott, Henry V. Gosling, Fisher Harris, Sadie Alder, Bobbie Carlton and Margaret Newman. Instruction 9 (b) (Ab. 266) was as follows:

“That the operating of gambling, prostitution, lotteries, etc., either before or after or during 1936 and 1937, *in and of themselves* cannot be considered by you as evidence of an agreement of conspiracy between the defendants in this case. Such conditions may or may not exist by agreement and their operation is consistent with the absence of such agreement.”

The fact that these places operated was not evidence of an agreement, but when we consider that evidence with the fact that collections were being made, instructions were being given to open and close these places, we immediately see that their operation does aid us in determining that the agreement existed. The Court did not exclude the consideration of this evidence from the jury, but merely told them that if this were all the evidence which they believed, then there was no evidence in this case which was evidence of an agreement. Counsel has simply misconstrued the effect of the instructions.

 CLASSIFICATION 2.

Under this classification counsel places all those facts that the State claimed showed a consciousness of guilt on behalf of the defendants. This evidence

consisted in both accusations made and not denied by the defendants, and conduct on their behalf which showed a consciousness of guilt.

Considering first the evidence which was introduced of this kind against Erwin it will be remembered that as early as June, 1936, reports were made to Erwin of the frequency of rumors of graft by John S. Early, Austin Smith and Golden Holt and in each instance he said that he would investigate it and on practically every occasion said that he had not heard of it before. He was told by Mrs. Earle Van Cott that he and Finch were involved in the pay-off, and that each was receiving money from such sources. Erwin flushed considerably and stated "Oh, I am accused of that too, am I?" and then changed the subject. He was given a list of the establishments of vice which were operating in Salt Lake City and were paying protection money by A. M. J. Pritchard. He told Mr. Pritchard that he would investigate this matter and although Pritchard saw him on several occasions thereafter Erwin did not bring up this subject again. Knowledge of these operations was by this testimony brought home to Erwin. Finally, on January 15, 1938, Fisher Harris wrote Erwin a letter. In considering this testimony we must keep in mind that Erwin was the Commissioner of Public Safety and his Department was charged with the duty of enforcing the laws of Utah and the ordinances of Salt Lake City. Fisher Harris was the City Attorney of Salt Lake City, and had made an investigation into the graft situation then existing in Salt Lake City. He made this report to Erwin. Erwin received this letter on a Saturday afternoon and was not enough interested in this

investigation to ask for an immediate conference. Rather he put it off until the following Monday afternoon.

In this later conversation Erwin made the statement that Harris said all these places were operating and then Erwin wanted to know if Harris thought they wanted to pay money to the city for the privilege of operating and a conversation was had as to what they would be willing to pay, and then Erwin asked the question: "They say all these people pay off?" and Harris replied that that was correct. Erwin said: "You don't say," and then Erwin wanted to know if it would be all right for Finch to start collecting these amounts that had been discussed for the benefit of the city. One of the significant things about his conversation, is that Erwin at no time asked Harris the extent or scope of his investigation and how he knew the facts which he had purportedly determined, did not ask who it was who was paying off or who was collecting the money or what officials were involved in it. Why would a man who was Commissioner of Public Safety take such an attitude in discussing matters so important with the City Attorney of Salt Lake City? Was it that he was involved in this pay-off and did not need the information? Was it that he was afraid that by asking questions in connection with the matters above suggested that his own guilt might come out and be discussed?

It is the contention of the State that this conduct on the part of Erwin was properly submitted to the jury under the theory that it was not the usual or ordinary actions of an innocent public official desiring only to perform the duties of his office which in this case was the enforcement of the laws of this

State and of Salt Lake City. Erwin then again appeared in Harris' office on the day following the above conversation and told Harris that there were questions he should have asked the day before. Yes, there were many questions which he should have asked the day before, if he were an innocent man. Erwin on this occasion said: "You say you know who is collecting this money?" and upon replying that he did, Erwin asked who it was who was making the collections. He was told by the City Attorney, and upon Harris again saying that these places mentioned in the letter paid off, Erwin makes the remark: "Well, they wouldn't feel natural if they weren't paying off to somebody and what difference does it make who gets it?" Here again, Erwin did not ask questions which an innocent man would ask. He did not ask who ultimately got this money. This question would have been very pertinent to his own activities. Here again, the State says that Erwin did not act in the usual or ordinary manner of an innocent man, and again his conduct was properly submitted to the jury to determine whether or not they thought that this conduct showed innocence or guilt.

We then come to the Alta Club meeting on January 20, 1938. This was participated in by five or six persons and a full disclosure was made by Mr. Harris of the results of his investigation even to the statement that Erwin was receiving \$750 and Finch \$500. Upon the making of this accusation, Mr. Erwin said nothing, although it appears in evidence he had at various times remarked that it was the first time that he had heard of any pay-off in Salt Lake City. In view of the testimony of the witnesses Early, Smith, Holt, Runzler and Pritchard how could this statement be made by Erwin? He had knowledge of these rumors of pay-off for

practically two years and yet now at this late day he says it is the first time he has ever heard of such a thing.

Again, the State asks was this the conduct of an innocent man? If Erwin were not guilty would he not say that he had heard these things for some time and that he had made various efforts to trace them down or to stamp out the activities of the vice establishments in Salt Lake City? We contend that from this evidence the jury might well infer a consciousness of guilt on behalf of the defendant Erwin. The evidence against Mr. Finch and of this same character is also admissible to show his conduct and statements evincing a consciousness of guilt. As early as April, 1936, Mr. Finch told Austin Smith that the pay-off was approximately \$2,000 a month at that time and also stated that probably Abe Rosenblum would collect it as he had operated along those lines. Also in this same month information was brought to Mr. Finch by Judge Ellett that he was accused of receiving \$2500 a month behind his back.

After this statement was made Finch said nothing for a minute or two, and during this silence looked down at his shoes. At various times between April of 1936 and January of 1938, Finch was informed of the pay-off and vice conditions in Salt Lake City. He was informed of these by Austin Smith, Golden Holt, D. L. Hays and Early. In the conversation with Hays, Finch stated that he knew that gambling was going on in Salt Lake and replied that he was not going to do anything about it.

Just shortly before the middle of January, 1938, Finch had a conversation with Harris. (Here again it should be kept in mind that Finch was the Chief of Police and charged under the ordinances of Salt

Lake City with enforcing the law, and Fisher Harris was the attorney for the City of Salt Lake). Harris reported to Finch that there were all kinds of illegal activities in operation running in Salt Lake City in connivance with the Police Department, and that public officials were personally profiting from these activities. All Finch said was that he thought that the town was being run pretty well, and that he didn't see how all of these activities could be running, since about \$2,000 was being collected a year by Salt Lake City. At no time during this conversation did Finch ask the name of any person involved.

In the ordinary course of events, when a person in the position of Fisher Harris makes a report such as this and states that the Police Department is conniving with the operators of these activities, would not a person in the position of Finch seek to find out who it was that was involved and seek to find out what evidence the City Attorney had of such connivance? Could not the jury well infer from such conduct that Finch either knew all about it or was afraid to ask such questions because of the fact that he was implicated therein might be discussed? This was certainly matter that the jury could consider in determining whether or not Finch at this conversation, by his conduct, indicated a consciousness of guilt.

When considered with the evidence which has heretofore been recited, the meeting at the Alta Club, in which Finch took part, becomes even more pertinent and important. In this conversation that was had among those present, Finch was accused of having received \$500.00 a month from this pay-off and he did not deny it, and also during the conversation, Harris told of the illegal activities which

were operating in Salt Lake City, and at various times during the conversation Finch said he had never heard of such a thing before. After Mr. Finch had said at least three times that it was the first time he had ever heard of any pay-off situation in Salt Lake City, Harris told him not to say it again. Finch asked "Why?" And Harris told him that it wasn't so, and shortly after that and in this conference, Finch said that he would resign.

Mr. Finch's conduct was very much the same as that of Erwin's, and the same can be said of it. It showed a consciousness of guilt and certainly the jury were entitled to consider this evidence to determine whether or not Finch, by his conduct, indicated that he was connected with the pay-off in Salt Lake City.

Another conversation which is included within this classification is the conversation that Harris had with Pearce in the presence of Harold B. Lee. In that conversation Harris told Pearce that he knew of his relation with the pay-off and knew that he was involved with Ben Harmon and others. After this statement was made, Pearce remained silent for two or three minutes and sat there "licking his lips." Pearce's first words were not a denial of his involvement but the question, "Who says that I am involved in this thing?" And after possibly 15 names were recited, Pearce picks out the name of H. K. Record. This point has some significance in that H. K. Record is perhaps the only person outside of those directly involved in this conspiracy who testified to facts tying Pearce directly into this conspiracy. Pearce replied that he might be able to get some information as he was Ben Harmon's attorney and he did state that he was not involved, but this comes a little late

in view of his silence and demeanor upon Harris' statement that he knew him to be involved in the graft pay-off. The day after this conversation Harris called Pearce on the phone and asked him for information in connection with this graft pay-off and Pearce wanted to know why he should talk to Harris, and Pearce told Harris that he would call him in the next day or two. Pearce did not call Harris, so Harris called Pearce a few days after this and Pearce said, "I'll talk to you about this some other time."

We sincerely believe that the failure of Pearce to deny his involvement, the fact that his first question was who implicated him, rather than that he was not implicated, and his conduct of sitting there in silence, was sufficient for the jury to determine that there was an implied admission or acquiescence that the statement of Mr. Harris was true. Certainly his conduct in the subsequent telephone conversation is of value on the question of consciousness of guilt in that he did not call Harris as he promised, put off giving any information and at one time wanted to know why he should talk to Harris about such a situation. These we believe are substantially the items which are covered by defendants under their second classification of testimony.

In Underhill we find the following statements on this type of evidence:

Underhill on Criminal Evidence, Fourth Edition, Section 250, Page 465:

"Any statement or conduct of a person indicating a consciousness of guilt, where at the time or thereafter he is charged with or suspected of the crime, is admissible as a circumstance against him on his trial.

Evidence of circumstances, which are part of a person's behavior subsequent to an event with which it is alleged or suspected he is connected with or implicated in, is relevant if the circumstances are such as would be natural and usual, assuming the connection or implication to exist. This rule of circumstantial evidence may be regarded as almost universally applicable."

Also in the same authority at Section 259, Page 4 we find the following:

"The silence of the accused as regards statements in his hearing which implicate him directly or indirectly may be proved with the statements, and from his acquiescence the jury may infer that the statements are true and that they prove his guilt."

About the only case in the State of Utah discussing the question of implied admission is the case of

State v. Mortenson, 26 Utah 312; 73 Pac. 562 (1903).

In that case the defendant was charged with murder. The father-in-law of deceased, while the body was lying in the patrol wagon and the defendant was standing from six to eight feet away, stated: "He murdered you for a receipt that was on your body representing \$3,800 and you never ran away nor he never gave you a dollar." And it was testified that the defendant didn't say anything but hung his head and looked on the ground. The Supreme Court quotes from Underhill in much the same language as above appears. Our Court quotes from

Kelley v. People, 55 N. Y. 565; 14 Am. Rep. 342, as follows:

"When an individual is charged with an

offense, or declarations are made, in his presence and hearing, touching or affecting his guilt or innocence of an alleged crime, and he remains silent when it would be proper for him to speak, it is the province of a jury to interpret such silence, and determine whether his silence was, under the circumstances, excused or explained."

The Court held that the admission of this evidence was proper. In

Kelley v. People, supra,
one of the contentions of the defendants was that the statements there involved were not made directly to them but were made to others. The Court stated:

"Although the statements were not addressed directly to them, they were the subjects of the conversation and parties to it, in this, that they could with propriety and without a breach of decorum take part in it."

In *Rochia v. U. S.*, 78 Fed. (2d) 966 (1935),
a statement by one officer to his superior in the presence of defendant that there had been an attempt made by defendant while in custody to secure his release by bribery, and that defendant remained silent, was properly admitted in evidence, although not directly made to the defendant. In

Commonwealth v. Simpson, (Mass.), 13
N. E. (2d) 939,
the defendant held up an officer with a gun and made him get into an automobile. Another officer came up to the left hand side of the car and a girl who had been with the defendant stated to the sec-

ond officer, "The man in that car is holding up an officer." It was held that this statement, together with the fact that the defendant made no reply, was properly admitted in evidence. The Court says:

"If the defendant heard and understood the remark, it was for the jury to consider whether it was made by such a person and under such circumstances as naturally called for a reply, and also to consider what inference if any, would be drawn from his failure to reply, if in fact he made no reply."

These latter cases indicate that although the statement is not addressed directly to the accused, nevertheless if he has an opportunity to reply and in the ordinary course of events would make a reply, then such evidence is admissible. Apparently counsel in their brief take the position that the law is otherwise.

Two other cases which support this same proposition are

People v. McCoy, 127 Cal. App. 195; 15 Pac. (2d) 543 (1927).

People v. Piburn, 130 Cal. App. 56; 31 Pac. (2d) 470 (1934).

In connection with these conversations had with these men, towit: Finch, Pearce, and Erwin, it appears that they were informed of the situation in Salt Lake with respect to the illegal vice activities that were being operated. Then when told about these conditions and it being said to them that they were involved, they denied all knowledge of such conditions. They did this instead of telling of the information that had been brought to them by various individuals. It was our contention that

this conduct on their part indicated an intention to evade as much as possible the truth surrounding the pay-off in Salt Lake City. That the telling of falsehoods under such circumstances is material, we cite the following cases:

People v. Conroy, 97 N. Y. 62 (1884).

Wilson v. U. S., 162 U. S. 613; 40 L. Ed. 1090; 16 Sup. Ct. 895 (1895).

People v. Zabriski, 135 Cal. App. 169; 26 Pac. (2d) 511 (1933).

People v. Peccole, 92 Cal. App. 470; 268 Pac. 473 (1928).

Davidson v. State, 205 Ind. 564; 187 N. E. 376 (1933).

Commonwealth v. Jones, 297 Penn. 326; 146 Atl. 905 (1929).

State v. Thorp, 86 N. H. 501; 171 Atl. 633, (1934).

People v. Sampsell, 104 Cal. App. 431; 286 Pac. 434 (1930).

In People v. Conroy, supra,
the Court stated:

“The resort to falsehood and evasion by one accused of crime affords of itself a presumption of evil intentions, and has always been considered proper evidence to present to a jury upon the question of the guilt or innocence of the person accused.”

In Wilson v. United States, the Court said:

“Nor can there be any question that if the jury were satisfied from the evidence that false statements in the case were made by the defendant or on his behalf, at his instigation, they had the right, not only to

take such statements into consideration in connection with all the other circumstances of the case in determining whether or not defendant's conduct had been satisfactorily explained by him upon the theory of his innocence, but also to regard false statements in explanation or defense made, or procured to be made, as in themselves tending to show guilt. The destruction, suppression or fabrication of evidence undoubtedly gives use to a presumption of guilt to be dealt with by the jury. 1 Greenl. Ev., Sec. 37; 3 Greenl. Ev., Sec. 34."

In *People v. Zabriski*, supra, the defendant was charged with taking and driving an automobile without the owner's consent. The stolen automobile was seen by a witness with two persons in it. He saw it crash into the two parked cars, and saw the two defendants attempt to get away. The witness caught one of the defendants and told the officers upon their arrival that he had hit a couple of autos, and this defendant stated: "It ain't so, I never done anything; I haven't even been in or near a car." Another witness stated that this defendant said that he had not been in the car and did not know Zabriski (who was proved to be the other person in the car). The Court stated that this evidence was admissible:

"False statements intended to conceal connection with criminal acts tend to show consciousness of guilt (*People v. Cole*, 141 Cal. 88; 74 P. 547) . . . "

In view of the other evidence tying the defendants Pearce, Finch and Erwin into this conspiracy, and

these denials of any knowledge of the conditions, make this case particularly applicable. In

People v. Peccole, *supra*, the defendant had been convicted of the crime of assault with a deadly weapon. Defendant had received cuts and bruises on his head. He told two different stories as to how he had received these bruises and cuts. The Court held that evidence of these stories was admissible on the theory that if he had believed he was not in the wrong in the trouble between him and the victim, he would have unhesitatingly told the officers that he received his injuries in such fight. The Court held that he was motivated by the consciousness of having committed an unjustifiable attack on his victim and he purposely withheld knowledge of the circumstances of said trouble. The Court said:

“Being rationally subject to such interpretation, the testimony of the officers that the accused had given to them untruthful accounts of how he was injured was properly allowed.”

In Commonwealth v. Jones, *supra*, the Court stated:

“This untrue statement was a circumstance indicating guilt. ‘The fabrication of false and contradictory accounts by an accused criminal for the sake of diverting inquiry or casting off suspicion is a circumstance always indicative of guilt.’ Com. v. Spardute, 278 Pa. 37; 122 A. 161.”

It must be realized that each case must be viewed in the light of its own circumstances to determine whether or not the evidence of consciousness of guilt is admissible. If it is rationally subject to

such an interpretation, then the matter should be submitted to the jury for their consideration. In the following cases the Courts have held that conduct of the defendants is admissible when they indicate a consciousness of guilt. In

State v. Lambert, 104 Mo. 394; 71 Atl. 1092;
15 Ann. Cases 1055, (1908),

the defendant had been informed that an accomplice had been arrested and at the time of the defendant's arrest he had a loaded revolver in his overcoat pocket. The Court pointed out that if the defendant had not carried the revolver for the purpose of resisting arrest, he had an opportunity to explain it. The Court held that this evidence was admissible and it was for the jury to estimate what weight and value should be given to the evidence, as an indication of the consciousness of guilt of the defendant. In

State v. Steinkraus, 244 Mo. 152; 148 S. W.
877 (1912),

the defendant was charged with arson, and his defense was that he had accidentally set fire to the building. Evidence was introduced to show that he made no statement regarding the fire to persons whom he met immediately after the explosion which started the fire. The Court said:

“While ordinarily one accused of crime has the right to remain silent, yet, in cases where his silence is unusual and not in accordance with the common experience of mankind, it becomes evidence of guilt. It would be but slight evidence, it is true, but its weight would be for the jury.”

“When told there was a fire in town, he pretended to be surprised and asked the location of the fire. This was as strong

an indication of guilt on his part as the fact that he needlessly ran from the building when he saw it burning."

In *People v. Sprague*, 52 Cal. App. 363; 198 Pac. 820 (1921),

the defendant was charged with rape. On coming out of the room where the crime had been committed, he met the witness, who occupied the next room. Defendant knew that he occupied this next room. The witness stated that the defendant's face was rather disfigured and that he appeared blanched and somewhat excited. The Court stated:

"It was permissible to argue that defendant did or did not behave as would an innocent person under similar circumstances. The weight of the testimony was for the jury, but it was not error to admit it."

"The conduct of a suspected person charged with crime, when it is such as to show a consciousness of guilt, is always admissible."

In *State v. Sullig*, 97 Ore. 427; 190 Pac. 580 (1920),

the defendant was charged with murder. Defendant and his wife and two children, age 2 and 4, lived in an isolated place. The defendant appeared at the home of a neighbor and announced that his wife was dead as a result of gunshot wounds, apparently inflicted by some accident. He stated that he had left home after supper to drive the cows to pasture and when he returned he met his little boy carrying a gun and found his wife lying dead. The defendant stated to several people that he had made no effort to get the children to tell what had happened because they could not or would not talk, that they could not speak in sentences so he could

get any information from them. Evidence was introduced to show that the children were of more than ordinary intelligence and that the older one especially was fully able to talk and tell a story and give his impressions in a childish way. The Court stated:

“ . . . His every word and act in relation to the transaction, insofar as it might tend to show guilt on his part, was exceedingly important. If his actions in relation to the occurrence were extraordinary or unusual in any regard, or if his explanation of any of his actions were unreasonable or improbable, it became a circumstance to be weighed against him, together with the other circumstances, by the jury.”

Before the trial of this case defendant made written order to two persons directing that the children be taken out of the State. It was held that this evidence was admissible. The Court stated:

“It is true that the action may have been entirely innocent on the part of the defendant and may have been taken for the best interests of the children . . . ”

However, considering this evidence with the other evidence, the jury may have been justified in inferring that he sent them away to prevent their evidence from being presented to the jury, and the Court stated:

“While the circumstance may not have been of great weight, yet it was properly a matter for the jury to consider, and to be presented to them for that purpose.”

While none of these cases are directly in point, they indicate the liberality of the Courts in permitting

the conduct of an accused to be placed before the jury when it may rationally be interpreted to indicate a consciousness of guilt on behalf of the defendants. The general rule is stated in

16 C. J. 549, as follows:

“At least insofar as they tend to connect him with the crime, and are not merely self serving, the conduct and general demeanor of the accused after the crime, his language, oral and written, his attitude and relations toward the crime, and his actions in the presence of those engaged in endeavoring to detect the criminal, are always relevant.”

This indicates clearly that the activities and conduct of the three defendants when talking with Fisher Harris, the City Attorney, were clearly relevant.

Defendants have stated that there must be a direct charge of the crime with which they are being tried before evidence of their conduct indicating an implied admission is admissible. This is not the law.

The rule is stated in

20 Am. Jur., Sec. 570, as follows:

5 “As a general rule, when a statement *tending to incriminate* one accused of committing a crime is made in his presence and hearing and such statement is not denied, contradicted, or objected to him him, both the statement and the fact of his failure to deny are admissible in a criminal prosecution against him, as evidence of his acquiescence in its truth. The basis of such rule is that the natural reaction of one accused of the commission of a crime *or of*

implication therein is to deny the accusation if it is unjust or unfounded.”

In 20 Am. Juris., Sec. 572, it is stated:

“It is not essential that the statement assume the form of a direct charge, but may be such as would lead reasonable men similarly situated to construe it as incriminating.”

In *Terrasas v. State*, 25 Ariz. 476; 219 Pac. 226 (1923),

the defendants were charged with grand larceny. A calf had been stolen, drawn, and butchered. It was testified that a person said, “Here is the man that put the hide in the ditch.” The defendant did not reply. It was held that this was admissible because it was of such a nature and made under such circumstances that an innocent man would naturally have denied it or made some explanation. The rule is stated at

Page 1278 of 80 A. L. R., as follows:

“Likewise, in order that the failure of an accused person to deny an incriminating statement may be admissible as evidence against him, it is required that the nature of the statement be such as would naturally provoke or call for, a denial from men similarly situated. It is said that the statement must be a direct charge of guilt or *complicity* in the crime in question, but it does not appear to be necessary that the statement be of such tenor that any stranger hearing it would understand it as such, and the rule to be deduced from the substance of the cases is that, if in view of all the circumstances and events transpir-

ing up to the time at which the statement is made, persons similarly situated would reasonably be calculated to understand and construe the statement as incriminating, it is sufficient.”

We sincerely urge that under the foregoing authorities all of that evidence referred to by the defendants under Classification 2, is admissible in evidence.

Now referring to the cases of the defendant, we do not think any of them establish that the testimony here classified is inadmissible. In

Tate v. State, 95 Miss. 138; 48 Southern 13, defense counsel states that an incriminating statement involving the accused addressed to bystanders when the accused was present did not call for an answer, and that there was no admission by silence. This might lead this Honorable Court to believe that this case is authority for the proposition that an accusation made in the defendant's presence but addressed to another is inadmissible. Counsel for the defendant has not told us that in the facts of that case the defendant was prostrate on the ground, apparently unconscious, and of course the Court held that his silence proved nothing, for the reason that he undoubtedly did not hear the statement. In

People v. Bissert, 75 N. Y. Supplement 630, the defendant, a police officer, was charged with accepting a bribe from one Lena Schmidt under the agreement that he would permit her to conduct a house of prostitution. An inmate of the house was called and these questions and answers occurred:

“Q. What did you or Mrs. Schmidt say

to Bissert, and what did you hear Bissert say to Mrs. Schmidt at that time?

A. She asked him — she says: 'Why did you do this? You took money, and now you are chasing out the girls?'

Q. What did you hear Bissert say, if anything?

A. I did not hear what answer he gave."

It was held that this evidence was improperly admitted, since there was no evidence to show that Bissert heard the statement or no evidence to show that he made no reply. The Court also stated that conceding that he did hear and that he made no reply, he was at the time in the discharge of duties required of him by law and since he was then arresting these people, the Court did not think that he was bound to reply to charges made against him by persons confessedly violating the law. Wherein this case aids the defendants, we are at a loss to know.

McCormick v. State, 181 Wis. 261; 194 N. W. 347 (1923),

is also cited by defendant. The Court in that case pointed out that the only object that Shaw had in reading the letter containing the accusatory matter was to inform defendant of what he had done so that he might be fully advised as to the desirability of employing him as an attorney. And there is nothing in this case that is even remotely analogous to the situation there presented. In

State v. Evans, 189 N. C. 233; 126 S. E. 607,

the Court held that since no crime had been committed at the time of the declaration to the defendant, that he was under no obligation to deny it. In

Geiger v. State, 70 Ohio State 400; 71 N. E.
721 (1904),

it appeared that the defendant had leaned over to speak to his child and was told to wait and the Court said that for this reason the defendant's silence was not voluntary. The Court also points out that they did not believe the defendant was given time for reply or explanation. The Court cites

Murphy v. State, 36 Ohio State 628,
and holds that is not analogous. In this latter case, the two defendants had in their possession stolen goods and were apprehended, and one of thm, in the presence of the other, made incriminating statements incriminating both, and the other remained silent. This was held properly admitted in the Murphy case. The Geiger case certainly cannot stand for the proposition that a statement made in the presence of the defendant to another person does not call for a reply on his part. In any event, the case of

Commonwealth v. Lisowski, 274 Pa. 222;
117 Atl. 794,
is contrary to the holding of the Geiger case. In

People v. Hartwell, 175 Pac. 21,
the statements did not remotely purport to connect the defendant with the offense, and in

People v. Countryman, 195 N. Y. S. 728,
the defendant had already denied the accusation and the Court said that he was not called upon to get in a controversy with his wife.

Hoover v. State, 91 Ohio State 41; 109
N. E. 626,
is contrary to the Countryman case, if the Countryman case holds that the defendant was not required

to deny statements not involving a direct charge of the offense alleged. In

Hanna v. State (Tex.), 79 S. W. 544, the following precedes that quoted on page 64 of the Pearce and Finch brief:

“It seems that all those present were negroes, and there was nothing in this remark which pointed out or particularized appellant, nor was it said in such manner as to call it to his attention, or to indicate to him that he was the party referred to and called upon to make a statement.”

This clearly indicates that the reason for the holding that the accusation was inadmissible was not that it was made to a by-stander, but on the contrary, defendant could not know that it was said to him or about him.

The rule as stated from

1272 of 80 A. L. R.,

does not indicate that any of the evidence introduced by the State is inadmissible. This rule is set forth on page 64 of the Pearce and Finch brief. It should be noted that the rule there is that when an incriminating statement is made in a conversation between third persons, *“in which the accused is not included and when the remarks are not specifically addressed to him,”* it is frequently held that his failure to deny does not render the evidence admissible because he is not afforded an opportunity to deny. Counsel states that this rule is particularly applicable to the Alta Club conversation. That conversation was one in which both Finch and Erwin participated — hence, they were included in it. They had participated in the conversation at various times throughout the recital

made by Harris and so it would not have been an intrusion into this conversation or an interruption.

The annotation found at 80 A. L. R. has been supplemented at

115 A. L. R. 1510.

At page 1519 of this latter annotation and under the heading, "Accusations Made in Conversations Between Third Persons," the annotator states:

"Whether the silence of one accused by an inculpatory statement made in a conversation between third persons is admissible as a tacit acquiescence depends entirely upon the circumstances, under a reasonable construction of the rule stated *supra* 111, a, 1."

The rule there referred to is found at page 1516 and is as follows:

"As indicated in the earlier annotation on this subject, since testimony of tacit admissions constitutes only a circumstance, or some evidence, from which a finder of fact may deduce acquiescence in an accusation, and is not of itself inculpatory, apart from such acquiescence it is essential to admissibility that there be a showing that conditions existed at the time of the accusation which (1) afforded an opportunity to reply, and (2) naturally called for a reply. If the first is satisfied by showing presence, hearing, understanding, etc., the question remains as to whether a person similarly situated would or should have felt at liberty or naturally obliged to reply to the accusation, in the event that there

was no intention to acquiesce by failure to do so."

Cases permitting such accusation have heretofore been cited.

In the case of

People v. Page, 162 N. Y. 279; 56 N. E.
750;

the Court says that to be charged of the crime in the manner there shown by the evidence was similar to that of a defendant being charged in open court with the crime but refuses to speak or plead.

Wigmore, at 4 Wigmore on Evidence, Third Edition, Section 1072, Page 76,

states that this case is unsound. What evidence introduced in this case is analogous to that contained in the Page case? Counsel for the State do not know.

Counsel for the defendants cite a number of cases to the effect that where a denial is made, that then the evidence of the accusation is inadmissible. With respect to the testimony concerning the conversation between Harris and Pearce, it is true that Pearce, before the conversation was over, denied his involvement, but at the time he was first charged, he remained silent for two or three minutes and sat there "licking his lips." The first utterance was not a denial, but the question, "Who says that I am involved?" We believe that this conduct on his behalf is admissible as showing a consciousness of guilt. Before the conversation was over he may have sufficiently gained his composure as to play the part of an innocent man, but this does not change the fact that in the first instance his conduct was that of acquiescence and indicated a consciousness of guilt. This matter was for the

jury, and hence, properly admitted. Counsel for the defendant also points out that Finch denied knowledge of the pay-off the day before the Alta Club meeting. This is true, but the evidence shows that on at least three or four previous occasions, knowledge of the pay-off had been brought home to Finch and he was not telling the truth when he denied any knowledge of it. His denial at the Alta Club that it was the first he had ever heard of the pay-off again was not true, because under his own testimony, he had heard something about it a day or two before. These cases of denial are not here helpful.

In the case of

Commonwealth v. Smith (Pennsylvania);
161 Atl. 418 (1932),

the defendant was charged with arson. In the State barracks and in the presence of the defendant, a detective, a State trooper, and the accomplice, the confession of the accomplice was read. It stated among other things that defendant had procured accomplice to burn the building and had paid him \$1,000:

“ . . . There was silence for a moment when the detective questioned the alleged accomplice, Fisher, as to the details ‘analyzing the high spots;’ that Fisher reiterated the truth of the facts set forth in the writing; that the defendant, Molly Smith, asked if the matter could be settled out of court; that Bryant, the detective, asked defendant if she would if she could trust the witness. During the same conversation and between 5 and 15 minutes after the reading was finished, Mrs. Smith

said Fisher was a rat and a liar, emphasizing the reply with a strong oath."

"It will be noted that the complaint of the appellant is not directed to the admission in evidence of testimony showing the reaction of the defendant to assertions charging her with a crime, but to the admission and reading of the confession of the alleged accomplice. It is at this precise point that the lower court fell into error. 'The conduct or demeanor of a prisoner on being charged with the crime, or allusion being made to it, is frequently given in evidence against him.' *Com. v. Ford*, 86 Pa. Superior Court 483, 486. It follows that, when this defendant was charged with the crime, her inquiry as to whether the matter could be settled, the form of her agitation, and in general her reaction or responses were competent evidence. The proposition here, however, is to admit the confession of the accomplice on the assumption that she verified its accuracy by her silence. Unless the defendant assented either by word or conduct to the accuracy and correctness of the confession of Fisher, such evidence was hearsay."

Other cases permitting this type of evidence are

Knight v. State, 64 Tex. Crim. 541; 144 S. W. 967 (1912).

Commonwealth v. Ford, 86 Pa. Sup. Ct. 483 (1925).

Commonwealth v. Detwerler, 299 Pa. 304; 78 A. 271 (1910).

State v. Reed, 62 Me. 129 (1874).

People v. Dempsey, 63 Cal. App. 751; 219
Pac. 1041 (1923).

Territory v. Harrington, 17 N. M. 62; 121
Pac. 613 (1912).

Briley v. State, 21 Ala. App. 473; 109 So.
845 (1926).

Surber v. State, 99 Ind. 71 (1884).

Boreing v. Com., 201 Ky. 474; 277 S. W.
813 (1925).

Com. v. McCabe, 163 Mass. 98; 39 N. E.
777 (1895).

McKelvey v. State, 69 Tex. Crim. 538; 155
S. W. 932 (1913).

It is respectfully submitted on behalf of the State that all of this evidence referred to as Classification Number 2 was clearly admissible under the cases above set forth, especially when it is considered in connection with the other evidence introduced in this case. To merely take, for instance, the testimony that Early informed Finch that there was talk of a pay-off, does not, standing alone, have any probative value, but when we consider that this was only one of a number of instances when such information was given to Finch, and then when investigation was being made and he was talking to the chief law enforcement officer of the city, for him to say he had never heard of this pay-off situation before, we begin to see that the conduct of Finch was that of evasion and not that of an innocent man. In other words, we sincerely hope that the Court will consider the probative value of all this evidence by looking at its background in the other testimony admitted in this case.

We submit that this evidence comes within the general rules heretofore cited and quoted from

Underhill American Jurisprudence and Corpus Juris, and that the cases herein cited indicate that this evidence was properly admitted.

CLASSIFICATION NO. 3.

Counsel for Pearce and Finch have picked out about seventeen different points of evidence and classified them under this classification, stating that it is their position that none of this evidence under the rules of permissible evidence tends to establish in any degree the existence of the agreement and conspiracy alleged and that it is erroneously admitted and highly prejudicial. As indicated by

State v. Inlow, supra,
we cannot take an isolated fact and then consider that evidence alone in determining whether or not it has any probative value. We must look at it in its background of facts contained in the case.

Counsel for the State will attempt to discuss each individual piece of evidence noted by the defendant and show wherein it has probative value. The testimony of D. L. Hays was to the effect that he told Mr. Finch, "You must know that gambling is going on in these places either with protection or without regard to law." Mr. Finch stated that he knew that gambling was going on and when asked by Hays what he was going to do about it, said, he wasn't going to do anything about it. This conversation took place about November of 1937. This was direct evidence, that Mr. Finch was told of the prevalency of gambling in Salt Lake City. As previously pointed out, Mr. Finch had the duty of enforcing the law of this State and of Salt Lake City, and yet he states that he wasn't going to do

anything about gambling in Salt Lake City. This is a statement of his attitude and when we consider the other evidence in the case of his telling Smith in April of 1936 that the pay-off amounted at that time to about \$2,000 a month and Abe Rosenblum would do the collecting. He told Holt to see Rosenblum about making collections and shortly before this latter, had told Holt to close the town up, and about the first of August told him to let the places open up and when agitation by the women's clubs and others became frequent he told Holt in January of 1937 to close everything up and see that there was no more pay-off. His attitude as stated to Mr. Hays corroborates this other evidence and we can see why it is he refused to do anything about gambling. Mr. Finch's attitude in this respect is a material thing for the jury to consider.

The next testimony referred to is that of Judge Ellett "concerning the discussion as to the payment of fines of bookmakers so that the city could get the benefit of the fines." Of course, this testimony now under consideration was involved in a conversation had with Mr. Finch and was discussed under Classification No. 2. Judge Ellett had refused to entertain jurisdiction of a charge against the keeper of a gambling game, stating that a person committing such an act was subject to a felony charge and where that was so, he would require the complaint to be taken to the County Attorney's office. Finch wanted to be able to handle these cases in the City Court where a fine could be imposed. He discussed the possibility of this with Judge Ellett and the judge told him that he would not be a party to such procedure because his friends had informed him that Finch was receiving \$2,500 a month in his hand behind his back and that they just couldn't get together on such a scheme as

that. Finch said nothing for a minute or two and merely looked at his shoes. Under the cases heretofore cited in Classification No. 2, this evidence is admissible as an implied admission by Finch. As to whether or not a reply was called for, we may turn to Finch's testimony as shown on Page 182 of the Abstract and we find there that Finch stated that he told Ellett that he had heard these rumors all his life. Apparently even Finch believed that some answer was necessary to this accusation by Judge Ellett, but the jury has apparently preferred to believe Judge Ellett on this subject that no reply was made. Another piece of evidence referred to by the defendants is the testimony as to Mr. Finch that he did not particularly object to vice, but didn't want them to get the best of it. Here again we have a statement of attitude by Mr. Finch, that he was not particularly interested in enforcing the law which it was his duty to do, and his subsequent conduct is in line with this attitude which he took in talking to the head of his Vice Squad.

Counsel states that another piece of evidence under this classification is that on two or three occasions Finch ordered some operators to close and "these later re-opened." To consider this matter as isolated from the rest of the case does not show clearly just what Mr. Finch was doing, and this statement of counsel's is a nice bit of understatement. Under the evidence as introduced, in the latter part of June or the first part of July in 1936 after Holt had reported to Finch the fact that people up and down the street were talking of the graft pay-off, he told Holt to close up all the places in town. Holt visited them and they were closed. Then because Holt knew too much or for some other reason best known to Finch, Holt was called in and

told to see Rosenblum and to do what Rosenblum said. Then it was that Rosenblum discussed collections for houses of prostitution. Shortly after this and about the first of August, at which time Holt was to commence collections, Finch called Holt in and told Holt to let the various establishments of vice reopen and not to let them run too openly. Is this the conduct of an innocent man? Is this the conduct of a person who is not conspiring to permit, allow, assist and enable houses of prostitution and gambling establishments to operate in violation of law? Here he is telling the Chief of his Anti-Vice Squad to permit these places to open and run in violation of law. In January of 1937 things again became a little hot because of rumors and the talk of these women's clubs and again Holt was called in and told to close up all the places in town and to see that there was no more pay-off. How counsel can glibly say that this evidence consists in Finch ordering on two or three occasions "some operators to close, and these later reopened" is a misstatement of the evidence.

Counsel then says that the following evidence is under this classification. "That he (Finch) told the witness Holt he was making the town too hot, the later removal of Record and the later appointment of Thacker" is another outstanding example of misstatement. To take counsel's view of this evidence, there is nothing in it. But let's place it in its background. It was some time in February that Holt was told that he was making the town too hot. Yes, and why was this? Holt had been regularly collecting from the prostitutes on the first day of each month since August of 1936 and apparently someone was getting close on Holt's trail, and that is why Holt was removed. H. K. Record was then made the Chief of the Anti-Vice Squad. While

he was serving in this capacity, Pearce called him up and asked him to make collections from gambling establishments and other forms of vice. Record refused to do this and within fifteen days he was removed and Thacker placed on the squad with Holt on there to collect again from the prostitutes. This time it was not under Rosenblum, but under Ben Harmon, the man who had been making complaints to Finch about Rosenblum's place of business.

The next bit of evidence that defense counsel tries to pass off is that Holt declared that Finch told him to see Rosenblum. Of course, as heretofore pointed out, this fitted in perfectly with the scheme of enabling these places to operate and by so enabling them, to enrich the public officials of Salt Lake City.

Counsel says that the following testimony comes within this classification. "The testimony of Holt in which he intimated that Mr. Finch had told him to quit making collections, but which simmers down to the testimony that Mr. Finch had told him to close some places up." If counsel were attempting to deliberately misstate the record, he could not have done it any better. Holt's testimony did not simmer down to any such thing. Holt's testimony was, and remains, that Finch told him to make absolutely no *more* collections.

The testimony of Fisher Harris that Mr. Finch had stated on two occasions that he did not believe that there was a pay-off and had not heard of a pay-off and at the Alta Club that he said it was the first time that he had heard of the pay-off, and Finch's willingness to resign have been considered under Classification No. 2, and comes under the heading of conduct indicating a consciousness of guilt. Mr. Finch's agreement to resign is par-

ticularly significant in view of the charge that was made against him.

Counsel next includes in this classification the testimony of Mr. Hedman that he and Mr. Finch talked in Mr. Finch's office of the matter of an arrest by Hedman's department. The situation was simply this: gambling establishments had been raided by the Detective Bureau without the knowledge of Thacker who was at that time in charge of the Vice-Squad. Mr. Hedman was called in by Finch and there was Thacker. Thacker told Hedman that no further arrests were to be made of gambling establishments without Thacker's knowledge and that if any such information were received to place it in an envelope on Thacker's desk regardless of its urgency, and Finch sat there and said nothing. Under the particular circumstances of this conversation how could Hedman or anyone else come to any other conclusion than that Finch was backing up Thacker in his demands, and viewing this in the light of the other evidence we can well understand why Finch would be backing Thacker to prevent anyone from upsetting their little scheme to enrich themselves by enabling these establishments of vice to operate. The testimony of O. B. Record of a similar character with Mr. Finch is merely further evidence of this same thing, that is, preventing other officers from arresting in places within the protection of the conspirators. The testimony that Finch was seen talking to Rosenblum is admissible on the theory of showing their association and acquaintanceship.

Counsel then suggests that the evidence of the payment to Pearce by Holt of the money collected from houses of prostitution comes within this classification; also the talk by Mr. Pearce with Holt in September or October of 1937 about the collections

from various houses of prostitution. How evidence could be any more relevant or more material is hard to understand. This testimony connected Pearce with the collections of moneys from these places that were enabled to operate by police protection to enrich the conspirators. The testimony of Fisher Harris with respect to the conversation with Pearce and his subsequent conversation over the telephone has heretofore been discussed. Then counsel refers to the testimony of Record that Pearce called him into his office and told him that he (Pearce) had been authorized by the Mayor to make collections from gambling establishments *and other institutions of vice*, and then requested Record to make collections from the gambling establishments. Here again, we have evidence of Mr. Pearce attempting to further the interests of the conspirators by getting a person who could make the collections from those places that were to be protected from the enforcement of the law.

It takes no argument to show that all of this evidence was material and tended to establish the connection of the defendants with the conspiracy alleged in the indictment.

Every case cited under this classification is a case involving the sufficiency of the evidence and its admissibility. In

Wilder v. United States, 100 Fed. (2d) 177
(10th Circuit — 1938),

the appealing defendants and others were charged with a conspiracy to commit an offense against the United States, that is, to engage in the business of distilling whiskey and other distilled spirits without registering the still, to carry on the business of distiller without giving bond and with the intent to defraud the government of tax on the spirits dis-

tilled, to make mash fit for distillation on premises other than a distillery authorized by law, to remove distilled spirits on which the tax had not been paid to a place other than a distillery warehouse, sell distilled spirits so removed and to possess distilled spirits in containers not bearing the stamps required by law. The evidence showed a collection system created by some of the defendants, who were sheriffs and deputy sheriffs.

The Court specifically said that it was unnecessary for them to express any opinion as to whether the evidence proved a conspiracy to violate the Oklahoma laws, since it was the province of the courts of the State to determine that question. The Court pointed out that the county officials and their deputies did not bear any official duties by virtue of their offices to enforce the Internal Revenue Laws of the United States, and hence their failure to enforce such laws and to prevent a conspiracy to violate them was not enough to support a conviction under the Federal Conspiracy Statute. The Court held that there was no substantial evidence from which it could be reasonably inferred that defendants formed and furthered an agreement or understanding expressed or implied having for its object the violation of the laws of the United States. The first quotation on Page 78 of the Finch and Pearce brief relates to those places which possessed distilled spirits but also had a Federal license and only sold tax paid liquor, and of course, these individuals were not violating the Federal statutes, and the only question considered by the Court was the insufficiency of the evidence. In

Weniger v. United States, 47 Fed. 697,
Ninth Circuit, (1931),

defendants were charged with a conspiracy to violate the National Prohibition Law. The case was

reversed because of the insufficiency of the evidence. The appealing defendants are the sheriff and his deputy of Shoshone County. The other defendants who did not appeal were members of the Board of Trustees and the police officers of the village of Mullan. The conspiracy related solely to the liquor traffic in that village. The city officials encouraged liquor traffic by the collection of license fees pursuant to ordinances passed by the Board. They agreed that in consideration of the payments of these fees they would not interfere with this traffic. The appealing defendants were outsiders, that is, with separate and distinct functions to perform so far as the village was concerned. The defendants did not connive with the other defendants in the collection of these fees, hence, it became necessary to show that the appealing defendants participated in some other way. The evidence was to the effect that the sheriff and his deputy felt no interest in and were opposed to the enforcement of the National Prohibition Law, and of course, which law he had no duty to enforce and the Court held that the evidence fell short of showing that the particular conspiracy which was organized by the city officials of the village of Mullan was joined in by these appellants. The Court might well make the quotation carried as cited in large caps on page 80 of the Finch and Erwin brief. The appealing defendants were not under obligation to enforce the National Prohibition Act. In any event that condition is not applicable here because it was affirmatively shown that all of the defendants very actively participated in the conspiracy. In this case one appellant was cross examined respecting his knowledge of the prevalence of gambling in Mullan. Of course, there was no allegation that the defendants were in any

way concerned in a conspiracy affecting gambling. Except for this latter point, the entire opinion in this case deals with the question of the sufficiency of the evidence.

The other cases cited by counsel for the defendants under this classification are good law, but how they have application to the case at bar is difficult to see. In fact, they have no more to do with it than the cases here discussed. It is submitted that all of the evidence referred to under this classification was clearly admissible and when considered with its background of other facts, tended to establish the guilt of each of these defendants

CLASSIFICATION 4.

Under this classification, defense counsel treats of certain acts and declarations made by conspirators and it is the contention of the State that these acts were done in furtherance of the conspiracy and the declarations made concerning it were made while it was in operation.

Counsel has set up four pieces of evidence under this classification. The first one was that Mr. Hunsaker testified that Erwin had said, "I now have my Chief of Police," and that he might not be getting his full split, but they couldn't get the chief because he didn't make the collections. This testimony was only applicable to the defendant Erwin and constituted admissions on his behalf showing that he was involved in a conspiracy to enable vice establishments to operate for his personal benefit. That is, he had some one making collections for him. This evidence should not be considered under this classification, but is purely

an admission against interest by the defendant Erwin.

One of the leading cases on this question is the case of

Delaney v. United States, 263 U. S. 586;
68 L. Ed. 462; 44 Supreme Court 206
(1924).

The defendants in that case were charged with a conspiracy to violate the National Prohibition Act. In that case testimony was given by one of the conspirators of what another of the conspirators (the latter being dead) had told him during the progress of the conspiracy. The Court held this evidence admissible and also stated that the extent to which that kind of evidence is admissible is within the discretion of the trial court. There is no statement of the evidence which was introduced in that case, but in

International Indemnity Company v. Lehman, 28 Fed. (2d) 1, Seventh Circuit (1928). (Certiorari Denied, 278 U. S. 648; 73 L. Ed. 561; 49 Sup. Ct. 83).

the Court made an examination of the record in the Delaney case to ascertain what it was the witness had said and to which objection was made. It appears that a co-conspirator said, "He told me that we could sell whiskey, that it is alright, that Mr. G. had talked with Mr. D. (the Prohibition Director and the defendant herein) and that we could go ahead and sell whiskey."

The International Indemnity Company v. Lehman, *supra*,
discusses rather fully what evidence may be introduced in the nature of declarations by a con-

spirator which would be binding on the other conspirators. In that case plaintiff sued to recover on a contract of guaranty and defendant counter-claimed for damages in fraud. As to plaintiff's cause of action, there was a directed verdict in favor of the defendant. A verdict was rendered for defendant on the counterclaim. The facts involved were these: Plaintiff, through its officers, made an excessively high appraisement on land belonging to S.; S. sold this land to defendant, the defendant checking on the appraisement made by plaintiff; S. had shown defendant a piece of land other than his own and which was worth more than S's land; one Smith was a representative of the defendant and testified that he asked S., referring to the fraudulent and over-appraisement of the land by plaintiff, "What did they do that for?" It then appeared that Smith testified that, "He, (S.) said Mr. Blackstock (president of plaintiff company) was a friend of his and he wanted them to put on a big appraisement on it, so that he could dispose of it, and he said that was what they did. I told him that was not the way respectable people generally did business." It was held that this was admissible since there was proof of a conspiracy between S. and the plaintiff. The Court then stated that it could terminate the discussion as to admissibility and uphold the ruling of the lower court on the authority of

American Fur Company v. United States,
2 Pet. 358; 7 L. Ed. 450 (1829).

Nudd v. Burrows, 71 U. S. 426; 23 L. Ed.
286 (1875).

Wiborg v. United States ; 41 L. Ed.
289; 16 Sup. Ct. 1127, 1197 (1895), and

Delaney v. United States, *supra*,

but there were so many cases limiting admissible acts or declarations to those done in "furtherance of the conspiracy" that a consideration of the meaning of this phrase should be had. The Court said:

"Some Courts have held the declarations of one conspirator admissible when they formed part of the *res gestae*, while still others have admitted such declarations when made 'during the progress, and in the prosecution of, the joint undertaking, or accompanying and explaining acts done in furtherance thereof'." Jones, *Comm. on Evidence*, Sec. 943.

Reference is also made by the Court to the case of

Connecticut Mutual Life Insurance Company v. Hillman, 188 U. S. 208; 23 Sup. Ct. 294; 47 L. Ed. 446.

Of this case the Court stated:

"Suit was upon an insurance policy. Defendant denied the death of the insured and charged various individuals with conspiring to defraud it out of a large sum of money by reporting his death when they knew he was alive. The trial court refused to receive the testimony of certain witnesses who would have testified as to conversations had with certain of the conspirators other than Hillmon, the insured. One witness, Crew, would have testified that he was acquainted with Baldwin and had several notes for collection against him, two of which were secured by a mortgage upon which he was contemplating foreclosure. Baldwin told him that a part of

the money represented by his indebtedness had been furnished to insure the life of Hillmon, and that as soon as he could get it he would be able to straighten up all his affairs. The witness Carr would have testified that he and Baldwin had been out buying live stock, and that Baldwin stated 'he was under 'brogue' with John W. Hillmon, and he said that he and Hillmon had a scheme under 'brogue,' and he said that if it worked out all right he was all right.' In a literal sense, it could hardly be said that this testimony was in furtherance of the conspiracy. The Court, however, held that such testimony should have been received."

The Court then quotes as follows-

"These questions and declarations of Baldwin to the four witnesses above stated were made either just before or just after the policy was taken out. They were not so much narrative of what had taken place as of the purpose Baldwin had in view, and we know of no substantial reason why they do not fall within the general rule, stated by Greenleaf (1 Greenleaf on Ev., Sec. 111), that every act and declaration of each member of the conspiracy, in pursuance of the original concerted plan, and with reference to the common object, is, in contemplation of the law, the act and declaration of them all, and is therefore original evidence against each of them. The conspiracy then existed and was still pending."

The Court quotes

Marron v. U. S., 8 Fed. (2d) 251,
as follows:

“It is elementary that, where there is proof of a conspiracy, the act or declaration of one of the parties thereto in reference to the common object may be given in evidence against the others ”

The Court then stated:

“The rule we deduce from these cases is that an admission of one conspirator, if made during the life of the conspiracy, is admissible against a joint conspirator, when it relevantly relates to and is ‘in furtherance of the conspiracy’ reference is not to the *admission* as such, but rather to the *act* concerning which the admission is made; that is to say, if the act or declaration, concerning which the admission or declaration is made, be in furtherance of the conspiracy, then it may be said that the admission is in furtherance of the conspiracy.”

The case of

American Fur Company v. United States.
supra,

was a libel for forfeiture of liquor transported to Indian country for trading purposes, and the Court stated the rule as to declarations as follows:

“ . . . where two or more persons are associated together for the same illegal purpose, any act or declaration of one of the parties, in reference to the common object, and forming a part of the *res gestae*

may be given in evidence against the others.”

In *Nudd v. Burrows*, *supra*, declarations of one conspirator not in the presence of the defendants were permitted, quoting the above quotation from the *American Fur Company* case. The evidence was not set out. The Court, however, did hold that the rules of evidence are the same in both civil and criminal cases where conspiracy is involved. In

Wiborg v. United States, *supra*, the defendants were charged with setting on foot and preparing and providing means for a military expedition against Cuba. The defendants were in charge of a boat and took it outside the three mile limit and a number of persons came aboard from another boat and were let off six miles from Cuba. Evidence of the declarations of members of the party as to their purposes was admitted. The declarations mentioned in the opinion were that they were going to Cuba to fight the Spaniards. The trial court commented that if they were in a combination to do an unlawful act what was said by any of them in carrying out their purpose was evidence against them. The rule as above stated in the *American Fur Company* case was again quoted and the Court stated:

“The declarations must be made in furtherance of the common object or must constitute a part of the *res gestae* of acts done in such furtherance. Assuming a secret combination between the party and the captain or officers of the *Horsa* had been proven, then, on the question whether such combination was lawful or not, the

motive and intention, declarations of those engaged in it explanatory of the acts done in furtherance of its object came within the general rule and were competent.

The extent to which evidence of this kind is admissible is much in the discretion of the trial court, and we do not consider that that discretion was abused in this instance. *Clune v. U. S.*, 159 U. S. 590; 40 L. Ed. 269.”

In *United States v. Gooding*, 12 Wheat. 460; 6 L. Ed. 693 (1827),

the prosecution was under the slave trade acts. Defendant was the owner of the vessel and one Hill was the captain of said ship. While at St. Thomas, Hill talked to one Coit about joining up as mate. In this conversation he described the voyage as one to obtain slaves. Coit asked who would see that the crew were paid in the event of disaster and Hill replied, “Uncle John,” meaning, as the witness understood, the defendant. The Court held that this evidence was admissible and the Court said:

“The testimony went to establish that he endeavored to engage Captain Coit to go as mate for the voyage then in progress, and his declarations were all made with reference to that object, and as persuasives to the undertaking. They were, therefore, in the strictest sense, a part of the *res gestae*, the necessary explanation attending the attempt to hire.”

In *Jones v. United States*, 179 Fed. 584, Ninth Circuit (1910),

the defendants were charged with a conspiracy to defraud the United States of certain public lands

by establishing a forest reserve. A number of declarations by conspirators in the absence of other conspirators were admitted in evidence. These statements were held admissible against all the conspirators. The Court held that since the conspiracy was still in existence and although the statements were not strictly in furtherance of the conspiracy they related to its object and were admissible, therefore, as part of the *res gestae*. One Puter had a conversation with Mays and asked him if he didn't expect some opposition in having this reserve established. Mays said not, saying that Senator Mitchell (a conspirator) was there to help him out "and you know how Bing Hermann stands in." It was held that this evidence tended to show that Hermann was involved in the conspiracy. One Ormsby was to investigate the advisability of the reserve and received a letter from Hermann instructing him to make this investigation. Ormsby's son had a conversation with Ormsby before the latter made the investigation. The son stated that he heard there was going to be a reserve established or there was a movement to establish one and Ormsby said, "Yes, there is going to be." The Court held that the declaration need not be made in furtherance of the conspiracy, and states:

" . . . but in the present case the statement was made while the conspiracy was in progress, related to the object of the conspiracy and was therefore part of the *res gestae*."

In *People v. Woods*, 206 Mich. 11; 172 N. W. 384 (1919),

the defendant was charged with arson. The evidence tended to show a conspiracy between defendant, LaFrance and McCauley to burn certain stock

and obtain the insurance, the same being the property of the defendant. Defendant was to pay LaFrance and McCauley for doing the job. A conversation, the words of which are not set out in the opinion, was had between McCauley and one Sullivan. The Court held that this evidence was properly admitted because it took place in connection with work being done in furtherance of the conspiracy. The Court states:

“The general rule is well settled that, where several persons are engaged in one crime or unlawful enterprise, whatever is said or done by one of them in the prosecution of the common enterprise, or while it is still in progress, is evidence against all the parties to it.” *People v. Pitcher*, 15 Mich. 396.

“At the time of McCauley’s conversation with Sullivan the conspiracy was in progress. It took place in connection with work being done to further the conspiracy, while some of the old livery stock was being moved from LaFrance’s place into the barn proposed to be burned, which had attracted Sullivan’s attention.”

Burns v. State, 8 Okla. Cr. 554; 129 Pac. 657, (1913), states the rule as follows:

“But the law is equally well settled that, where a conspiracy is entered into by two or more persons to do any unlawful act or to accomplish any unlawful purpose, the persons who engage therein are responsible for all that is said or done in pursuance of such conspiracy by any of their co-conspirators until the purpose for which

the conspiracy was entered into has been fully accomplished and that the responsibility of co-conspirators is not confined to the accomplishment of the common purpose for which a conspiracy is entered into, but extends to and includes all declarations made and collateral acts done incident to and growing out of the common design, when spoken or done by a co-conspirator as against all his co-conspirators."

In *Carnahan v. United States*, 35 Fed. (2d) 96, Eighth Circuit (1929),

the defendants were charged with a conspiracy to violate the National Prohibition Act. While the defendant DeMayo was waiting for the defendant Carnahan to drive up with a car loaded with alcohol, DeMayo stated to two government witnesses, "in connection with his suspicions because the car of Carnahan was being followed:"

"'You are the first stranger I ever deal with;' he says, 'I been doing business here for a long time, government try to get me for at least 5 years, but they have not succeeded yet. I told my boy if the government wants to have me arrested they would arrest me on the first delivery I make.' He says, 'If they would have arrested me look what the government will get in my possession' and he pulled out of his pocket two checks. 'Some money, one check was \$10,000 and one was \$15,000, I says to Mr. DeMayo, 'You must do 'good business.' He says, 'Yes, I make about \$10,000 worth of business per month'."

The Court held that this was admissible and stated:

“This was a statement by a conspirator concerning the subject of the conspiracy during the existence of the conspiracy. As such, it was competent against all of the conspirators. *Lave v. U. S.*, 34 F. (2d) 413.”

In *Lancaster v. United States*, 39 Fed. (2d) 30, Fifth Circuit (1930),

the defendants were charged with a conspiracy to unlawfully import, transport and sell intoxicating liquor. The liquor was obtained in Cuba. One of the defendants stated to Depew who was then being employed to make the trip to Cuba that he and the other appellants had taken a trip to Havana and had made all arrangements to get the liquor. It was held that this evidence was properly admitted, since the conspiracy then existed. In

Irvin v. State, 11 Okla. Cr. 301; 146 Pac. 453, (1915),

the defendants were charged with murder. The evidence tended to show that the defendant's actions were motivated by a conspiracy to obtain by fraud and forgery the land of the persons killed. A witness testified that the defendant Allen stated at about the time of the murder that there was \$5000 in it to be furnished by a Muskogee man named Irvin if they would kill the two children and mother with dynamite, powder and coal oil. Allen also said that if the witness could go to Mexico and identify one Sellers (father and husband of those killed) there would be expenses and \$500. Irvin was not present. It was held that this was admissible against all of the conspirators, including Irvin. In

Kolkman v. People, 89 Col. 8; 300 Pac.
575 (1931),

it is held that acts and declarations made by conspirators to conceal and prevent detection of crime are admissible in evidence as against its conspirators not present. To the same effect see

Lew Moy v. U. S., 237 Fed. 50 (1916).

In the light of the foregoing cases counsel for the State proposes to discuss the evidence here referred to by counsel for the defendants.

The first testimony referred to is that incident about the middle of January, 1938 when Harmon called Holt and asked him to pick him up on First South and Regent Street. Holt picked him up and after driving down onto the West side of Salt Lake, Harmon said, "For God's sake don't take any more collections whatever, because Mr. Harris and Mr. Lee have got hold of Mr. Pearce and accused him of being in the pay-off. For God's sake see that there is no more of it. Don't take anything from anybody because it might blow over." Both Holt and Harmon were in this conspiracy and Harmon was here doing an act to conceal or prevent the detection of this conspiracy. In other words, he was telling Holt to cease the continued collection of moneys in hopes that the thing would "blow over." The jury could infer from this that he had in mind that if these collections were ceased there would be no further activity in detecting the existence of the conspiracy. As explanatory of his declaration in this regard, he stated that Pearce had been accused by Fisher Harris of being involved. This latter statement under the above authorities was merely

a part of the res gestae of this declaration and as said in some of the foregoing cases it was a declaration made incident to and growing out of the common design and was stated while the conspiracy was in progress. So far as the case at bar is concerned, this is the declaration which closed the conspiracy and as appears from this statement the acts in furtherance ceased with the hopes that the investigations would "blow over," as they had done on at least two previous occasions. It is submitted that this declaration was admissible and binding on all persons engaged in the conspiracy.

The next testimony referred to was that of the witness Kempner when he related the trip on which Abe Stubeck collected money from three of the card games and brought the money to Ben Harmon at the Mint. The testimony showed that the three places visited by Stubeck were engaged in gambling in violation of law. The testimony of D. L. Hayes proved this illegal activity. It is submitted that any person who was collecting money from these places was engaged in the furtherance of the conspiracy to enable those particular gambling establishments to operate. While Stubeck was performing these acts in furtherance of the conspiracy and as part of the res gestae and characterizing the acts he was doing, he stated that all card games were paying off; that he took the money to Ben Harmon's place and that Harmon would split the money with Erwin and his crowd. Here again it is submitted that these declarations by Stubeck were made while the conspiracy was in progress and were made in relation to the conspiracy. While these declarations were not strictly in furtherance of the conspiracy, they come within the meaning of that term as laid down in

Delaney v. United States, supra, and International Indemnity Company. v. Lehman, supra, and other cases cited.

The next testimony that is referred to as being within this classification and inadmissible is the conversation that H. K. Record had with Pearce some time during the middle of April, 1937. At that time H. K. Record was Chief of the Vice Squad and Pearce called him and asked him to come to his office. On his arrival he found Mr. Pearce and Ben Harmon there. Pearce told Record that he had been responsible for having him placed as head of the Vice Squad and Erwin had instructed him, Pearce, to make collections from gambling houses and other forms of vice. Record asked them how much they wanted or expected to get and Pearce replied \$1700 per month. Record then asked Pearce where he expected to get that much and Pearce outlined amounts he expected to obtain from various gambling establishments. Record told Pearce that he wouldn't be a party to a thing of that kind and Pearce said that if Record would string along with them and keep things in line he would give him \$165 of it. Record again told him that he would not be a party to such a thing and Pearce told him they would get someone else to handle it. Pearce, insofar as he himself was concerned, by this statement admitted that he was working with Erwin. He was here attempting to get someone to make collections in furtherance of the conspiracy alleged in the indictment.

This is very similar to the case of Gooding v. United States, where Hill was attempting to get Coit to join in the illegal enterprise of obtaining slaves. This certainly was an act done in furtherance of the conspiracy and all statements made in

that connection under the foregoing authorities which might be considered as *res gestae* of such act are admissible in evidence. The statements of Pearce were made while the conspiracy was in progress and had relation to its objects. Under the foregoing this evidence was clearly admissible.

THE TESTIMONY OF THE ACCOMPLICE HOLT WAS SUFFICIENTLY CORROBORATED.

Golden Holt was an accomplice of the defendants Pearce, Erwin and Finch, but his testimony was sufficiently corroborated.

Section 105-32-18, Revised Statutes of Utah 1933, provides:

“A conviction shall not be had on the testimony of an accomplice, unless he is corroborated by other evidence, which in itself and without the aid of the testimony of the accomplice tends to connect the defendant with the commission of the offense; and the corroboration shall not be sufficient, if it merely shows the commission of the offense or the circumstances thereof.”

All the cases which decide the problem of whether or not an accomplice is sufficiently corroborated must consist of a construction of the foregoing statute. As pointed out in

Powell v. State, 177 Ark. 938; 9 S. W. (2d) 583 (1928):

“Of the many decisions of this Court passing on the question of a corroboration of an accomplice, not one of them is author-

ity for any other decision of that question, because each case necessarily must depend upon its own peculiar facts, and no case is found where the facts are precisely the same."

Counsel for the State will follow the rule as suggested by this Court in

State v. Laris, 78 Utah 183; 2 P. (2d) 243, wherein it quotes from a Texas case to this effect:

"Eliminate from the case the evidence of the accomplice and then examine the evidence of the other witness or witnesses with a view to ascertain if there be inculpatory evidence."

Taking first the evidence against Finch which was testified to by witnesses other than the accomplice Golden Holt, we find that Austin Smith testified that about a month after Finch was appointed, he talked with Finch at Finch's home. Finch stated that he liked his job alright and when asked approximately what the pay-off was as it existed at the time, Finch answered that it was approximately \$2000 per month. Smith then asked him who was getting the money, what became of it and who collected, and Finch said that probably Abe Rosenblum would collect it as he had had experience along those lines. Next we have the testimony of A. H. Ellett, Judge of the City Court, who had a conversation with Finch some time about the middle of April, 1936. This conversation took place on the same day that Judge Ellett had refused to entertain charges against keepers of gambling games in the City Court, but had stated that those cases should be taken to the County Attorney's office since they were felony cases. Finch at that conversation

asked the judge why they couldn't get together on the sentencing of these gamblers and let them pay the fine and let the city get the revenue. Judge Ellett told him that the reason they couldn't do that was because his friends told him that Finch was taking \$2500 per month in his hand behind his back and that the judge would not be a party to it. Finch said nothing for a minute or two, but merely looked down at his shoes. As heretofore indicated, it is the contention of the State that this showed that Finch was conscious of his guilt and constituted an implied admission of the statement made.

About the 25th day of August 1937, O. B. Record and Officer Burke made an arrest in the basement of the Atlas Building for bookmaking. A couple of days later Officer Record and Sargeant Pearce, a police officer, made an arrest in the basement of the New Grand Hotel of some bookmakers. After these two arrests, Record had a conversation with Finch and Finch asked him if he had any complaints about these particular places and Record said that he hadn't. Finch then suggested that he let Thacker handle the arrests and not to interfere and that if there were any complaints of gambling to let Thacker or Finch know and he would see that they were taken care of.

D. L. Hays had a conversation with Finch about November, 1937 at Finch's office. Hays told Finch that he must know that gambling was going on either under protection or without regard to law. Finch stated that he knew gambling was going on and when asked what he was going to do about it, he replied that he was not going to do anything about it.

Soon after Christmas of 1937, Captain Hedman, who was in charge of the Detective Bureau, was

called to Finch's office. When he arrived Finch stated that Thacker seemed to have a grievance. Thacker stated that he wanted to know why Hedman had ordered a raid on a gambling place at an address west on 4th South and Hedman said that he hadn't ordered the raid, but that it had been made by the Detective Bureau, but couldn't see what difference it made who ordered the raid. Thacker stated that he had to know about these raids and Hedman then wanted to know what Thacker expected him to do. Thacker told him to write it down and leave it on his desk, that is, any information relative to gambling. Hedman wanted to know what was to be done if Thacker wasn't there and the nature of it was that it had to be taken care of immediately. Thacker told him to still put it in an envelope and leave it on his desk and he would take care of it. Finch sat there and said nothing and as pointed out before by his conduct anyone would say that he was in favor of what Thacker requested. This has also been pointed out to have aided them in effecting the object of the conspiracy alleged.

We then have the conversations between Finch and Fisher Harris in Harris's office and also at the Alta Club. His conduct in this regard was discussed under that subdivision of the brief relating to conduct evincing consciousness of guilt. Then, of course, there is the fact that Finch at first agreed to resign when Harris told of his involvement in the collection of moneys from vice and his subsequent refusal to resign. Also in connection with his denials of knowledge of the pay-off we must remember the statements made by Early and by Smith telling him of these conditions. These again were considered in that part of the brief relating to con-

sciousness of guilt and this Court is respectfully referred to that subdivision for the contention of the State as to force of this testimony. Does this testimony in itself tend to connect the defendant with the commission of this offense? This testimony shows that he knew the amount of the payoff, knew that Abe Rosenblum did take care of the collections; that he impliedly admitted he was receiving \$2500 per month behind his back; that he was telling some officers not to make an arrest, but to let others do it; and then impliedly admitted at the Alta Club that he was receiving \$5000 per month, and then when faced in the involvement of the houses of prostitution, he agreed to resign.

Of course, in addition to Holt's testimony, is the testimony that these gambling places were operating wide open; that the houses of prostitution were in operation; that Pearce attempted to get Record to make collections; and then within two weeks after Record's refusal to take part in the collection of money, Finch removed him as head of the Vice Squad. It is submitted that this testimony tends to connect the defendant Finch with a conspiracy to permit, allow and enable houses of ill-fame and gambling establishments to operate in violation of law.

Taking next the testimony against Pearce we find in April of 1937 he called H. K. Record into his office and while in the presence of Ben Harmon told Record that he was responsible for having him placed as head of the Vice Squad and that Erwin had instructed him, Pearce, to make collections from gambling houses and other forms of vice. This testimony has been repeated two or three times in the course of the brief and a further detail should not here be necessary.

We then have the testimony of Fisher Harris in

which he told Pearce that he knew of Pearce's involvement in the pay-off and his relationships with Ben Harmon and the testimony of Pearce's conduct which as heretofore argued indicated an implied admission of his involvement and showed conduct on his part indicating a consciousness of guilt. It is submitted that this evidence in and of itself tends to connect Pearce with a conspiracy to permit, allow, assist and enable houses of ill-fame and gambling establishments to operate in violation of law.

As to the defendant Erwin, we have the evidence of Ben Hunsaker in which Erwin as early as March of 1936 told Hunsaker that he had his Chief of Police and expected him to bring in good money, and further told Hunsaker that he was going to get his while he had a chance. Then there is the conversation of July 3, 1936 with Hunsaker in which he told Hunsaker that he had had a hell-of-a-time getting things lined up and that he only had a few gambling and a few bootlegging places going, but that he was getting the women of the underworld lined up and that he expected quite a lot of money to be coming in. Then again a conversation was had in the summer or fall of 1936 in which Hunsaker asked Erwin why he didn't write out a check and mail it to him and Erwin stated that he was not crazy enough to take \$200 in currency and take it to the bank and get a check for it each month; that he didn't intend to let "those fellows know what he was doing and that he would take care of the note in his own way." Then a similar conversation when Erwin asked Hunsaker whether he was making a report on his income of the \$200 per month and when Hunsaker stated he was not, Erwin said that he would not report it.

Then on another occasion Erwin stated that he had his Chief of Police in there and that it was bringing him in very good money, but not enough and if he had gotten the financial end of the city, he would be making plenty of money, and when Hunsaker told him they would get him, Erwin told him that somebody had to see him take the money; that they would have to prove he took it and this they couldn't do because he didn't collect. He stated Finch was the man they would get, but then he didn't think they would be able to get Finch because he didn't do the collecting himself, he had his men collect for him.

In the summer of 1937 Erwin told Hunsaker that things had tightened up and that he was having a hard time, especially with the Women's Betterment League in Salt Lake City. He stated they were after him and giving him a lot of trouble. Another conversation was had in 1937 in which he told Hunsaker that he thought the Chief of Police was taking in a lot of money, but that he didn't know whether he was getting his right split. Then further conversations were had in December of 1937 in which Erwin said that if they got hot on his trail because of the things he was doing in Salt Lake, he would resign as Mayor. Then, of course, as against Erwin there was the testimony heretofore referred to under the subdivision of this brief relating to conduct showing consciousness of guilt and implied admissions. That is, the testimony relating to the information which Erwin received of the pay-off existing in Salt Lake. His conversations with Fisher Harris, the probative value of which has been heretofore mentioned, and two resignations which were handed in and which gave different reasons for his resignation. These resignations were made at a time shortly after Harris had made the charges

that Erwin was involved in the collection of tribute from vice establishments in Salt Lake City.

It is respectfully submitted that this evidence in and of itself tends to connect Erwin with a conspiracy alleged in the indictment. Of course, as pointed out before, there is the evidence of the operation of these places and the activity of the others which did not come from the lips of Golden Holt.

EVEN THOUGH EVIDENCE WAS ADMITTED
OF DIFFERENT AND SMALLER CON-
SPIRACIES, NO ERROR WAS COMMITTED

The contention of counsel for the defendant that there was more than one conspiracy here involved is not conceded. It is the contention of the State that the same conspiracy existed throughout the tenure of office of Erwin and Finch and that various persons had various parts to play in effecting the object of this conspiracy. The witness Holt was in it during almost all of the time of its existence. Rosenblum was in it at first, but was replaced by Harmon. Pearce also came into it at a later time, but it was still the same conspiracy that had been originated by Erwin and Finch when they took office, but for the purpose of argument, let us concede that smaller conspiracies were proven. Certainly they were conspiracies to permit and allow houses of ill-fame to operate or gambling establishments to operate.

Most of the cases cited on this subject by defense counsel have been overruled by the case of

Berger v. United States, 295 U. S. 78; 79
L. Ed. 1314 (1934).

The only count that was really involved in that case was one charging a conspiracy to utter counterfeit

notes of one federal reserve bank each calling for \$100. Among the persons named as defendants were Katz, Rice and Jones. Katz pleaded guilty to the conspiracy and testified for the Government. The evidence tended to establish not the one conspiracy charged, but two conspiracies. One between Rice and Katz and another between Berger, Jones and Katz. The only connecting link between the two was that Katz was in both. The Court points out that certiorari was granted because of conflict among the circuits on the question of variance. The Court states that the law is well established that although an indictment charges conspiracy among several persons, but the proof established a conspiracy among only a few of them, the variance is not material or fatal. The Court then points out that several circuits have held that where one conspiracy was charged and the proof splits it into two, the variance is fatal. The Court states:

“This view, however, ignores the question of materiality and should be so qualified as to make the result of the variance depend upon whether it has substantially injured the defendant.”

The Court relies upon a statement directing it to enter judgment “after an examination of the entire record before the Court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the party.” This is similar to

Section 105-43-1, Revised Statutes of Utah, 1933.

The general rule that allegation and proof must be the same is based upon the obvious requirements,

(1) that the accused shall be definitely informed as to the charges against him so that he may present his defense and not be taken by surprise; and (2) that he may be protected against another prosecution for the same offense.

The proof was that the conspiracy between Katz and Rice was with the purpose of uttering the notes to buy rings and the conspiracy between Katz, Jones and Berger was to pass the notes to tradesmen. The Court stated that the evidence as to the conspiracy with which the defendant was not connected might be assumed to be incompetent, but nothing there appeared to prejudice his case. The Court held that the effect of defendant's objection was not that the indictment did not describe the conspiracies that the defendant was convicted of, but that it described more. Under the authority of this case, it is submitted that if more than one conspiracy was shown, the conspiracies were within the allegations of the indictment and there was no prejudice to the defendants. This Berger case is also reported

73 Fed. (2d) 278, (Second Circuit, 1934).

The case of

United States v. Manton, 107 Fed. (2d)

834 (2d Circuit — 1940)

follows the Berger case. The defendants were charged with a conspiracy to obstruct the administration of justice and to defraud the United States. The indictment alleges that the defendants conspired to obstruct justice in suits pending before certain courts of the United States to defraud the United States of the right to have the judicial function exercised without lawful impairment. It is further alleged that one Fallon would seek out litigants and obtain money for judicial preference

to be given by Manton who accepted money for such purpose. Twenty-eight overt acts were alleged, each act being in connection with a case on which Manton had received money. The Court in that case held, as we think the Court should hold here, that the conspiracy was a continuing one and that there was only one conspiracy covering a considerable period of time. The defendant Spector was only connected with one case, that case involving an infringement of a patent by the Packard Razor Company which the Schick Razor Company relied upon. Spector made the same contention which the defendants make under this subdivision of their brief. The Court stated:

“In a case like this, it is enough that a convicted defendant knew he had connected himself with a criminal conspiracy, even though he was unaware of its full extent.”

The Court then points out that even though the evidence connected the defendant Spector with a smaller conspiracy, there was no fatal variance. The Court also stated:

“If then, the view be adopted that Spector was not a party to the general conspiracy alleged the effect of the evidence would be to split the conspiracy, so far as Spector alone is concerned, into two: One the general conspiracy and the other, a smaller one, confined to the Schick case. Some of the Circuit Courts of Appeal have held that this would constitute a fatal variance, but the Supreme Court in *Berger v. United States*, 295 U. S. 78; 55 S. Ct. 629; 79 L. Ed. 1314, rejected that concept, holding that it ignored the question of materiality and ‘should be so qualified as to make the re-

sult of the variance depend upon whether it has substantially injured the defendant'."

Another case which follows the Beregr case is

Kopold-Quinn & Co v. United States, 101
Fed. (2d) 628 (5th Circuit — 1939).

In that case the defendants were charged with a conspiracy to violate the Securities Exchange Act and the Mail Fraud Statute. The defendants, Ricebaum & Gould & Company were in a conspiracy with Mendelson, Sueterman & Sherman to sell worthless stock and Kopold-Quinn & Company were in a conspiracy with the latter three to sell such stock. In other words, the first two named defendants and Kopold-Quinn & Company were not in a conspiracy together at all. The Court said:

"As to the conspiracy count, though notwithstanding the fact that one conspiracy is charged and two proven we think that under 'the Berger' case the conviction should be affirmed."

Martin v. United States, 100 Fed. (2d) 491,
(10th Circuit Court — 1939),

involved a contention that the indictment charged a nation-wide conspiracy and that the proof was of several small and independent conspiracies. The Court, in line with the Berger case, held that such variance was not fatal and affirmed the conviction. In the case of

United States v. Weiss, 103 Fed. (2d) 348
(2d Circuit — 1939),

one of the defendants claimed that he was not a member of the general conspiracy to use the mails to defraud but his only connection related to get-

ting money from one insurance company. The Court held that from his relations with the others it might be held that he was in the general conspiracy. See also

Allen v. United States, 4 Fed. (2d) 688
(7th Circuit Court).

This latter case sustains the proposition that there was only one conspiracy here proved.

It is respectfully submitted that in the first place the conspiracy alleged and the conspiracy proved was one continuous conspiracy, and that while various individuals had diverse parts to play in its accomplishment, it nevertheless remained but one conspiracy, and it is also submitted that even though this Court finds that there were more than one conspiracy proved, nevertheless under the authority of

Berger v. United States, supra,
and other cases decided in line with that case, there was no fatal variance and defendants are not entitled to a reversal for such reason.

THE DOCTRINE OF RES JUDICATA IS NOT APPLICABLE TO THE FACTS IN THIS CASE.

Defendants Pearce and Erwin contended that the doctrine of res judicata is applicable to this case based upon the proposition that the said defendants had heretofore been charged with a violation of

Section 103-51-10, Revised Statutes of
Utah, 1933,

in that they did wilfully, knowingly and feloniously accept, receive, levy and appropriate money without

consideration from the proceeds of the earnings of women engaged in prostitution and were acquitted on such charge. In the trial of this latter case, the evidence of Holt taking the money to Pearce on or about the first of June, 1937 was introduced in evidence. It should be noted that the verdict of "not guilty" was a general verdict. In that case it was necessary for the jury to find beyond a reasonable doubt each of the following elements:

- (1) That the defendants accepted, received, levied and appropriated money;
- (2) That the said money was from the proceeds of the earnings of women engaged in prostitution;
- (3) That the defendants knew that said money was received from the proceeds of the earnings of women engaged in prostitution;
- (4) That said money was so received without consideration.

The question of whether or not Holt as an accomplice was sufficiently corroborated as to his delivery of this money was also involved. From looking at the general verdict rendered in that case it is impossible to determine whether or not the jury reached its verdict based on the proposition of whether or not that one or more of the elements heretofore set out was not proved to their satisfaction beyond a reasonable doubt, or whether it was based on their belief that there was a lack of corroboration. If it was based on a lack of evidence with respect to the elements of the offense, it is impossible to determine which element was not proved to their satisfaction beyond a reasonable doubt. If it was based on the lack of corroboration, they well might have believed that all of the elements heretofore set out were proved to their

satisfaction beyond a reasonable doubt. Holt's corroboration in the conspiracy case need not be the same as the corroboration in the pandering case. In the pandering case, it was necessary that the evidence tend to connect Pearce with the receipt of money on June 1, 1936. In the present case the corroboration evidence must tend to connect Pearce and Erwin with the conspiracy charged in the indictment. From the foregoing, it becomes very clear that this general verdict did not *necessarily* adjudicate and determine any element of the present conspiracy charge. In the case of

Woodman v. United States, 30 Fed. (2d)
482 (5th Circuit — 1929),

the first count charged a conspiracy to violate the National Prohibition Act by the unlawful possession and sale of liquor and alleged overt acts. In the next 23 counts of the indictment, the defendant was charged with various substantive offenses. The first overt act was the securing and equipping of certain premises for the purpose of the sale of liquor. The other six overt acts were substantive offenses and were each alleged in the other counts. On the first trial of this case, the appealing defendant was found not guilty on all the substantive offenses and the jury disagreed on the conspiracy count. He and others in a similar situation were tried a second time. The defendant contended that his acquittal under the counts 2 to 24 is a final determination that those acts were not committed and hence evidence to prove any of them was not admissible to prove the commission of any of them as a circumstance from which the jury might find that the conspiracy had been committed. The Court stated that there might be much force to this contention if all the overt acts had been the basis of the substantive counts, but points out that the first

overt act was not one of these and this was sufficient upon which to base a conspiracy. The Court said:

“It is a fundamental principle of *res adjudicata* that the cause of action must be the same. That is not so in this case. The first count charges a conspiracy to commit an offense against the United States in violation of Section 37, Criminal Code (18 N. S. C. 88; 18 U.S.C.A., Sec. 88) which is not the same as the offense charged in the succeeding counts. *U. S. v. Rabonowich*, 238 U. S. 78; 35 S. Ct. 682; 59 L. Ed. 1211. Therefore acquittal of the substantive offenses was not a bar to prosecution for the conspiracy.”

The Court also said:

“We are not advised of any case holding that a party is estopped to prove a different cause of action by the same evidence offered in another case in which an adverse judgment was rendered. There are many cases to the contrary. It is well settled that a person may be acquitted of a criminal charge, yet recovery may be had against him for damages caused by his act. This would necessarily require the use of some or all of the evidence adduced in the criminal case, but the rule is the same when the State is the plaintiff. *Stone v. U. S.*, 167 U. S. 178; S. Ct. 778; 42 L. Ed. 127.

Evidence tending to prove any violation of the National Prohibition Act by any of the conspirators connected with the conspiracy, whether alleged as an overt act or

not, was relevant and admissible to prove the intent and common purpose of the alleged conspirators.”

The Court quotes from

Wharton on Criminal Evidence, (10th Edition), Paragraph 48, as follows:

“The question has been raised in criminal trials whether a previous indictment for, or acquittal or conviction of, the other crime, has any effect upon the admissibility of the evidence of such other crime. It may be safely stated that the almost universal judgment is that neither of these circumstances will operate to the rejection of such evidence.”

In *State v. Coblentz*, 169 Md. 159; 180 Atl. 266 (1935),

the defendant was charged with signing a statement for a corporation, which statement contained false reports as to the assets and liabilities with a view to enhancing the market value of its shares. The defendant entered a plea of *res adjudicata* alleging that he had been charged with accepting a deposit when the banking institution was known by him to be insolvent, that in said trial the deposit of money was admitted and the only issues were whether the bank was insolvent and whether defendant knew it to be insolvent and from this contended that the State was estopped from asserting either of these two propositions against the defendant.

Freeman on Judgments, 5th Edition, Sec. 648,

is quoted to the effect that there is no reason for a difference in the rule of *res adjudicata* between

criminal and civil cases but recognizes this limitation:

“But under such circumstances, the previous judgment is conclusive only as to those matters which were in fact in issue and actually and necessarily adjudicated.”

In this quotation from Freeman, what he says of the case of

Jay v. State, 15 Ala. Ap. 255; 73 S. 137,
is set out as follows:

“Thus an acquittal of the charge of seduction does not adjudicate the question of sexual intercourse, although that was one of the issues in the case, since the acquittal might have been due to the failure to establish other facts essential to a conviction.”

The Court then states:

“The opinion in that case is to the effect that all of the elements necessary to a conviction in one case must be present in the subsequent case where the former adjudication is pleaded, otherwise the plea is not available; in other words, the offenses must agree in all their essential facts . . . ”

The Court points out that an acquittal does not ascertain any precise facts. There may be an insufficiency of proof of one fact where several were necessary to make a case:

“In other words, the evidence necessary to produce a conviction in one case must be adequate to support a conviction in the other.”

The Court held that defendant's contention was

properly overruled by the trial court and that there was nothing in the first case to preclude this prosecution.

State v. Heaton, 56 N. D. 357; 217 N. W. 531 (1928),

is directly contrary to the case of

State v. Hopkins, 68 Mont. 504; 219 P. 1106 (1923),

which latter case is relied on extensively by the defendants. As shown by Wharton the weight of authority supports the Heaton case. In the Heaton case the defendant was charged with making a false entry in the books of a bank to show knowledge, intent and motive, evidence was admitted proving a large number of embezzlements. The defendant had previously been charged with the embezzlement of \$78,000 and that charge involved this same evidence. In the embezzlement case he was found guilty of embezzling less than \$20. Defendant argued that such evidence was not admissible and if it was admissible he should have been permitted to prove the verdict of acquittal in order to rebut the inference of guilt. He offered the judgment roll and the verdict in the first case. The Court pointed out that the previous offense was not an essential part of the offense for which the defendant was tried in the instant case, and in referring to the verdict and assuming that it was an acquittal, the Court states:

“What determined this conclusion does not appear from the record, and cannot be shown.”

In *People v. Rogers*, 170 N. Y. S. 86, (1918), the defendant was charged with attempted robbery. At the time and place of this offense, defendant had robbed another, had been charged with this latter

robbery and had been acquitted. His defense in both cases was that of alibi. Defendant contended that the former acquittal constituted *res adjudicata* on the question of alibi, and he therefore should be acquitted in the present case. The Court stated:

‘At the threshold of the inquiry it should be borne in mind that the verdict of the jury was not acquittal of the crime; it was that the evidence before the jury was insufficient to prove defendant guilty beyond a reasonable doubt. This was the fact necessarily determined in defendant’s favor and no other fact.’

Defendant argues that alibi was his defense; that a question of fact was thereby raised and the verdict was conclusive, but the Court points out that this is false because it cannot be said that the verdict was based on the evidence of alibi. Such evidence was not necessary to a determination of the issue although it was relevant thereto.

Rudd v. Cornell, 171 N. Y. 114; 63 N. E. 823, was quoted as follows:

“A judgment is conclusive in a second action only when the question was at issue in a former suit . . . and that the conclusive character of a judgment extends only to the precise issues which were tried in the former action . . . and the party seeking to avail himself of a former judgment must show affirmatively that the question involved in the second action was material and actually determined in the former, as a former judgment will not operate as an estoppel as to immaterial or un-

essential facts, even though put in issue and directly decided.”

Patterson v. State, 96 Ohio St. 90; 117 N. E. 169; L. R. A. 1918A 583 — 1917,

is a case very closely similar to the case at bar. Defendant there was charged with the larceny of an auto belonging to one Wherry. It appeared that defendant and another were in a conspiracy to steal automobiles and three automobiles had been stolen. Defendant had been previously charged with the theft of a car belonging to one Clock and had been acquitted on that charge. Defendant objected to any testimony relating to the theft of the Clock car and it was overruled. In his defense, he offered the record of the indictment, trial and acquittal of the Clock deal but the lower court excluded the same. These rulings of the lower court were upheld and many cases are cited. The syllabus in this case properly reflects the holding:

“Upon the trial of the accused upon an indictment for larceny of Wherry’s automobile, where the State relies for conviction upon proof of such criminal plan to steal various automobiles, belonging to Wherry, Clock and others, and offers evidence of such criminal plan and the larcenies of cars other than charged in the indictment, the fact that the accused at a former trial had been acquitted of the larceny of Clock’s car does not conclude the State from proving that such plan embraced the larceny of Clock’s car, although the evidence offered at such second trial was substantially the same as that produced by the State on the former trial which resulted in a verdict of acquittal. Nor can

the record of such former acquittal be offered by the accused either as a bar to the offense charged in the second indictment or as an adjudication of the fact that the accused was innocent of the theft of C's car and that the criminal plan did not embrace the larceny thereof."

Other cases which uphold the contention of the State that *res adjudicata* does not apply to the present case are the following:

Duvall v. State, 111 Ohio 657; 141 N. E. 90 — 1924.

Seymour v. Commonwealth, 133 Va. 775: 112 S. E. 806 — 1922.

McCartney v. State, 3 Ind. 352; 56 Am. Dec. 510.

The case of

State v. Cheeseman, 63 Utah 138; 223 P. 762, (1924),

sustains the position of the State on this proposition. In that case defendant was charged with involuntary manslaughter arising out of an automobile accident. The defendant entered a plea of a former acquittal. He produced evidence that he had been charged with failure to immediately report the details of an automobile accident, and had been found not guilty of such charge. The accident was the same one as that involved in the present case. Defendant contended that this former verdict was conclusive evidence in behalf of the defendant since it was adjudged that there was no accident. From the case it does not appear that the defendant relied upon his plea of former acquittal, but upon his plea of not guilty and upon the above evidence

as sustaining said plea. The Court points out that the defendant might have been acquitted in the former case because he did not know there was an accident. The Court quotes from

Burlen v. Shannon, 99 Mass. 200; 96 Am.
Dec. 733,

to the effect that a verdict or judgment is only conclusive as to those facts which were necessarily involved. It was quoted to the effect that if it was left in doubt on which of two grounds a party had prevailed, *res adjudicata* could not apply.

Robinson & Company v. Marr, 181 Ill. App.
605, is there quoted as follows:

“For a judgment in a former suit to operate as an estoppel, there must be no uncertainty as to the precise question raised and determined in such suit; and it must appear upon the record or by extrinsic evidence that the precise question is a controlling issue in the second suit.”

Russell v. Place, 94 U. S. at Page 608,
24 L. Ed. 214 is quoted as follows:

“It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record — as, for example, if it appear that several distinct matters may have been litigated, up-

on one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered — the whole subject-matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible.”

It cannot be said from the indictment or verdict in the former case against Erwin and Pearce that a finding was made that Holt did not receive this money, and if this be true, under the Cheeseman case, *res adjudicata* is not here applicable. The jury in said former case might not have believed beyond a reasonable doubt that the money was received without consideration.

With respect to the case of

State v. Hopkins, *supra*,

it is respectfully pointed out that there the evidence sought to be introduced in the second trial was evidence of a prior offense, admissible for the purpose of showing that defendant acted with a felonious intent in committing the robbery charged in this case. In cases of prior offenses, under the rule, it is usually essential to make out all the elements of the prior offense — hence, this case is not applicable to the case at bar for the reason that the testimony relative to Pearce receiving the money without consideration and knowing it to be from the proceeds of women engaged in prostitu-

tion is not an element in this case. As pointed out in the citation from Wharton on Criminal Evidence quoted above and from

2 Wharton on Criminal Evidence, 11th Edition, Sec. 363,
the Hopkins case is a minority holding.

In the case of

State v. Creechley, 27 Utah 142; 75 Pac.
384, (1904),

cited by counsel for the defendants, the jury failed to find a verdict on defendant's plea of former acquittal. However, in that case the record was not before the appellate court and therefore the Supreme Court held that it appeared there were the two issues raised by the defendant by his plea of not guilty and his plea of former acquittal, and that the jury had not made any finding with relation to the plea of former acquittal and hence he was entitled to a new trial.

In the present case the evidence is before this Court and it conclusively appears therefrom that there was no evidence on the question of former acquittal sufficient to be presented to the jury, and further, it appears that the Court as to this matter directed a verdict for the State. (Ab. 279). The prior charge upon which defendants here rely for their plea of former jeopardy was a charge that the defendants had knowingly accepted money without consideration from the proceeds of the earnings of women engaged in prostitution. The charge now made against the defendants is that they were in a conspiracy to enable houses of prostitution and gambling establishments to operate. The mere statement of the two charges shows that they were not the same. In

Durke v. State, 204 Ind. 370, 183 N. E. 97
(1932),

the defendant was charged with the crime of conspiracy to commit a felony, to wit: Burglary. He had previously been acquitted of the burglary. The Court held there was no former jeopardy. See also

State v. Blackledge, 216 Iowa 199; 243
N. W. 534 (1932).

In *Hilt v. U. S.*, 12 Fed. (2d) 504, Fifth
Circuit (1926), the Court stated:

“Of course, it is not true, as contended, that a conspiracy to commit an offense is in legal effect the same thing as the substantive offense itself. *Moorehead v. U. S.*, 270 Fed. 210.”

The case of

Oliver v. Superior Court, 92 Cal. App. 94;
267 Pac. 764,

is not applicable here. The overt acts as alleged were the substantive crimes contained in the other counts and on which latter offense the defendants had been acquitted. The allegation in the present indictment is that the overt acts consisted in collecting, or causing to be collected, money from houses of ill fame. The substantive offense, previously charged and the acquittal of which counsel claims to be conclusive, was of knowingly accepting, without consideration, money from the proceeds of women engaged in prostitution.

It is respectfully submitted that under the foregoing arguments and authority the doctrine of res adjudicata is not here applicable. We cannot tell from the general verdict rendered upon what precise facts the former jury held that Pearce and Erwin were not guilty of the crime there charged.

THERE WERE NOT IMPROPER STATEMENTS OR COUDUCT OF THE DISTRICT ATTORNEY COMMITTED OR ALLOWED, AND EVEN THOUGH SUCH IS FOUND TO EXIST THEY WERE NOT PREJUDICIAL ERROR OR REVERSIBLE ERROR.

Counsel for Finch and Pearce in his brief has set forth 30 matters which he claims constitute misconduct on the part of the District Attorney. Most of these relate to statements made in the opening statement. The balance refer to statements made during the course of the trial, which covered a period of a month. Seated on one side of the counsel table were H. L. Mulliner, attorney for defendant Pearce; Burton W. Musser, attorney for E. B. Erwin; Frederick C. Loofbourow, attorney for Harry Finch, and Willard Hanson, D. N. Straup and Stewart M. Hanson, attorneys for Frank Thacker. The State was represented by Calvin W. Rawlings, District Attorney, and his assistant, Brigham E. Roberts. This case was hotly contested from the moment of its beginning, to its end. During the heat of battle in a case contested as this one was, statements were made by all attorneys present, which probably should not have been made. As pointed out in case after case, these things will be considered by the appellate court in looking over the conduct of counsel on both sides. No one will deny that the attorneys for the defendants did have sufficient ability to cope with anything that took place during the trial of this law suit, and the record amply bears out the fact that they gave more than they took. So far as the opening statement was concerned, there is no question but what the District Attorney made a very full statement of

the facts which he anticipated he would prove, and in almost every instance the evidence was finally introduced in the trial of the case and certainly effort was made to introduce everything stated in the opening statement.

In the case of

People v. Tenorowicz, *supra*,

the attorney for the State made a very full opening statement. The Court stated that in view of the type of case there involved and the mass of facts which were introduced, the District Attorney was entitled to make such a statement.

Upon a perusal of the entire record, it appears that the court instructed the jury time and time again that the remarks and statements of counsel were not to be considered by them as evidence in the case. He did this on a number of occasions during the opening statement of the District Attorney, and upon its completion, he made a very full statement to the jury with respect to the fact that only evidence which came from the lips of witnesses on the stand was to be considered by them, and instructed them that statements of counsel were not evidence.

In the cases considering misconduct of the State's attorney in the presentation of what he expects to prove, it is universally held that it must be shown that there was bad faith on the part of the State's attorney in making the statements complained of. In

State v. Olivieri, 49 Nev. 75; 236 Pac. 1100
(1925),

the defendant was charged with an assault with a deadly weapon. On the opening statement the State's attorney made the statement that the de-

fendant, shortly before shooting the prosecuting witness, was intoxicated and was in a reckless or vicious humor, desired trouble, and was armed. The proof offered at the trial did not measure up to this. The Court stated:

“It is the duty of counsel making a statement to state the facts fairly, and to refrain from stating facts which he cannot or will not, be permitted to prove. *People v. Stoll*, 143 Cal. 689; 77 Pac. 818. Yet the mere violation of the rule by a prosecuting attorney is not itself evidence that he acted in bad faith, and reversible error. *People v. Wong Hing*, 176 Cal. 699; 169 Pac. 357; *People v. Davis*, 26 Cal. App. 647, 147 Pac. 1184.”

Nothing in the record in that case, as is also true in the case at bar, indicated an intentional disregard of the truth or an intent on the part of the District Attorney to influence the jury by a false statement of the facts which he expected to prove. In

People v. Donaldson, 26 Cal. App. 63; 171 Pac. 442 (1918),

the prosecuting attorney in the opening statement stated that he would prove a conspiracy between the defendant and another, giving the details of such conspiracy. The Court stated:

“It appears that the prosecution, through inability to prove the conspiracy, offered no testimony thereon; and the defendant now claims that the reference to such matters constituted misconduct for which the judgment should be reversed. There is absolutely nothing in the record indicating

that the statement of the District Attorney was made in bad faith, and therefore it did not constitute misconduct. *People v. Gleason*, 127 Cal. 323; 59 Pac. 592."

In both of these cases the appellate court refused to reverse the conviction. Counsel quotes from

State v. Distefano, 70 Utah 586; 262 Pac. 113 (1927).

The following quotation should precede that set forth on page 156 of the Pearce and Finch brief:

"In the opening statement to the jury counsel may properly fully state all of the material facts which the evidence will establish."

It is submitted that there was no misconduct in the opening statement and in any event, the jury were fully, completely, and thoroughly instructed upon the office of an opening statement, and that the remarks of counsel were not to be considered by them as evidence. In some instances the evidence which came from the lips of the witness was slightly different from that stated by the District Attorney. An example of this is the statement in which the District Attorney stated what Judge Ellett would testify. The District Attorney stated it would be to the effect that Finch said to Judge Ellett, "Why can't we let these things run on?" In fact, the testimony was that Finch stated, "Judge, why can't we get together on the sentencing of these gamblers?"

The case of

State of Utah v. Martin, 78 Utah 23; 300 Pac. 1034 (1931),

is particularly applicable to the case at bar. The Court there stated:

“But as a general rule remarks of a prosecuting attorney which ordinarily would be improper are not ground for exception if they are provoked by defendant’s counsel and are in reply to his acts or statements, unless such remarks go beyond a pertinent reply and bring before the jury extraneous matter touching important issues.

. . . the rule is that an appellate court is not required to pass on such an objection to remarks of counsel in argument, where no motion or request is made to the trial court to have the remarks withdrawn from the consideration of the jury or to instruct the jury not to consider the same. 16 C. J. 915; 17 C. J. 71.”

Starting on page 159 of the Pearce and Finch brief counsel details a number of things which he claims are misconduct. When the entire record is considered, it becomes clear that this is not so. The first instance there pointed out occurred during the testimony of Judge A. H. Ellett. The proceedings are partially contained at pages 77 and 329 of the Abstract. As reflected by the record, the following transpired:

Q. Now will you tell the court and jury what happened, what in your court relative to these gamblers, that were mentioned over the telephone?

MR. MULLINER: I will object to it as incompetent, irrelevant and immaterial un-

til some foundation showing it happened in the presence of the defendants or they had something to do with it.

MR. RAWLINGS: It was mentioned, Your Honor, over the telephone, and it is the basis; we are laying a basis to explain the conduct of the conspirator that afternoon. It will have a tendency to explain the conduct, and it is a basis for the conversation that we are going to bring in.

MR. MULLINER: May I say, Your Honor, these matters are very important. We are going to have some more of them this afternoon of alleged admissions by failure to deny something. Now, these statements made by anybody are hearsay statements ordinarily, but they are let in as an exception to the rule where they point directly to guilt so as to require or demand a denial and a denial is not given. If general hearsay statements are made that do not call for such, of course, it is very prejudicial testimony. Now, this doesn't even get to the conversation, but it is some circumstance again from which it is hoped that some detrimental inference will be drawn of something that happened out of the presence of the defendants. Now, if Mr. Finch said something that is admissible here, it isn't necessary to go into a lot of things in order to get up to that.

MR. RAWLINGS: Your Honor, we just desire to show what happened relative to the gamblers that were in the judge's court that day immediately prior to the conversation had with Chief Finch, and it was those

cases of what happened there which predicated the conversation and will explain the conduct of the chief and what was said and done at that time.

MR. MULLINER: Now, it couldn't possibly get into this case properly and any inference be drawn from the knowledge. If Mr. Finch was told anything about it, that can properly be recited here. That is the only thing, and that is the only way anybody can know whether Mr. Finch knew anything about it, unless it is shown he was there and knew what happened.

THE COURT: It rather seems to me —

MR. RAWLINGS: I think his conduct —

MR. MULLINER: And at this time that wouldn't be as against anyone else except Mr. Finch, if it amounted to something that required a denial from Mr. Finch.

MR. RAWLINGS: Well, of course, in regard to matters of denial I think the jury will be asked to determine whether or not these statements would require a reasonable person to deny them.

MR. MULLINER: I object to that. I object to counsel facing the jury and making a statement of that kind to the jury, and I assign it as prejudicial error in this case.

MR. RAWLINGS: The fact that I faced the jury?

MR. MULLINER: Yes, and made the statement that you did to the jury. Counsel has made an opening statement here that ought to be sufficient to satisfy him

without making these repeated statements during the course of the trial.

MR. RAWLINGS: Of course, Your Honor, I think I have explained what we desire to do, and I reiterate that the jury here is the person and institution that will be called upon to determine whether or not such a statement as will be introduced would be denied by a reasonable person. We reiterate that.

THE COURT: I am in doubt about permitting you, however, to show the acts that transpired in the Police Court. Now I am inclined to think that I ought to limit you to conversation he had with the chief. I doubt very much if —

MR. RAWLINGS: The only thing about it, it explains the conversation.

THE COURT: Well, there is no evidence that he knew about what happened.

MR. LOOFBOUROW: Purely hearsay.

MR. RAWLINGS: All right, I'll withdraw the question at this time.

All arguments here made were pertinent to the issue then before the court and it should be noted that counsel did not ask that the jury be instructed to disregard the statement nor was there a motion for a mistrial.

The next statement complained of is the one made by Mr. Rawlings that he would be pleased to introduce a certain conversation, but that he was afraid there would be an objection. The record on this is fully set forth on page 978 of the record (par-

tially set out at page 101 of the Abstract), as follows:

MR. MULLINER: Now, just a minute. I move to strike out that he met Gus Captain and had a conversation with him and how long he knew him. It is just another of those things, Your Honor, to show what happened the next day, and it will all be argued in here as evidence when we get through.

MR. RAWLINGS: Oh, no it won't.

MR. MULLINER: If he wants to show something that happened after that, why doesn't he go to it and show it?

MR. RAWLINGS: You wouldn't let us.

MR. MULLINER: Well, he said he had a conversation with Gus Captain, but he hasn't asked him what was said; but they would be claiming something for it. It is conduct entirely outside of the knowledge of any defendants.

MR. RAWLINGS: We would be pleased to introduce that conversation, but we are afraid there would be an objection.

MR. MULLINER: I assign counsel's statement as prejudicial error.

THE COURT: I don't quite see the importance of having it in the record, the talk with Gus Captain.

MR. MULLINER: That there is no point to referring to it at all. That is what I am objecting throughout the case. Just things from which inferences can be drawn

without any testimony being introduced with regard to them.

THE COURT: I will order stricken the statement that he had a conversation with Gus Captain.

Q. Well, after you saw Gus Captain I think you said you saw Ben Harmon?

A. Yes.

Again it appears that the defendants failed to ask the court to here instruct the jury or declare a mistrial, and it further appears certainly that this was not misconduct on the part of the District Attorney, even within the cases cited in the Pearce and Finch brief. It should further be noted that as to the last question, there was not even an objection by defense counsel.

The next happening which counsel claims to be misconduct is the statement by the District Attorney to the effect that the City Attorney, the chief law enforcement officer of the city, was making charges against the mayor. Such conduct comes in the middle of an argument which extended from page 1295 of the Record to page 1304. Certainly arguments were made by defense counsel during this time which would permit statements to be made by the prosecuting attorney expressing his theory of the relevancy of this evidence.

The next happening which counsel cites as misconduct relates to the statement of Mr. Rawlings that ignorance of the law is not justified. The statement of the court to the effect that the jury had been instructed to disregard all statements of counsel on these matters appearing on Page 194 and 332 of the Abstract and Page 1648 of the Record

was a substantial compliance with the request of the defense counsel.

The next misconduct cited by the defense counsel is that in connection with the question asked the witness, O. B. Record on Page 2027 of the Record, also pointed out at Page 333 of the Abstract. The statement made by Mr. Rawlings to the effect that all of these matters were prejudicial to the defendant and just as prejudicial as indicated and as Mr. Mulliner thought it was, was not at any time during the trial objected to as appears from Page 2028 of the Record. Also it came at a time when Mr. Mulliner accused the District Attorney of attempting to bolster up testimony.

The remaining acts of misconduct had relation to statements made in the closing arguments to the jury. It will be noticed that in not one instance does defense counsel request the court to make any rulings on the statements made by the District Attorney. That is, the court was not asked to instruct the jury to disregard the statement nor was a mistrial requested. Under

State v. Martin, *supra*,

these matters even though they would constitute misconduct were not properly raised. The State contends with respect to these matters that the evidence introduced during the trial of the case justified each and every statement it made.

In the case of

People v. Grossman, 82 P. (2d) 76,
and cited by counsel for the defendants, the ruling of the Court that the statement of the District Attorney was not reversible error was based upon the fact that the jury were instructed not to consider

it. Counsel's statement that no reversal resulted because this stood alone cannot be found any place in the decision.

The case of

State v. Soloman, 96 Utah 500; 87 P. (2d) 807,

has nothing in it which could possibly be helpful in a determination of this case. In

State v. Barone, 92 Ut. 571; 70 P. (2d) 735, (1937),

the Utah Supreme Court refused to reverse the case because of the conduct of the District Attorney, although he had brought to the attention of the jury on the State's main case, a prior conviction of a felony by the defendant.

In none of the other cases cited by defense counsel is there anything which is helpful in determining this objection now under discussion. It is respectfully submitted that there was no misconduct on the part of the District Attorney, and if such existed, it either was not properly raised in the trial court or was not sufficient to constitute prejudicial error. The following statement from

State v. Murphy, 92 Ut. 382; 68 P. (2d) 188, (1937),

is applicable to this case:

"The record before us contains considerable argument of counsel for both sides, relating to the admissibility of evidence and objections to questions asked. But there is nothing to indicate that such arguments were unfair, were dishonestly made,

or were, not in the main, pertinent to the issue under discussion.”

Also the statement contained in the concurring opinion of Mr. Justice Wolfe is applicable:

“It is obvious from the record that the prosecuting and defense counsel, a former prosecuting attorney, both pre-eminently able to handle themselves in the trial of cases, asked and gave no quarter. The fact that there were exchanges and sallies between them, that there was loaded into the arguments made to the court some remarks by both which appear to go beyond those necessary to support the arguments and which mayhaps intend to carry over to the jury, does not present sufficient in this case upon which to ground prejudicial error.”

THE COURT DID NOT ADMIT IMPROPER MATTERS OF EVIDENCE.

In the Pearce and Finch brief, commencing at page 166, counsel points out generally that the court erred in admitting certain improper matters of evidence. The ones specifically mentioned therein are:

- (1) Fisher Harris getting in the contents of the letter, Exhibit R;
- (2) That counsel for the defendants were accused of trying to suppress facts;
- (3) Harris' conversation with the judge in which Harris stated, in addressing himself to the court, that there had been an offer to prove that some-

thing he had done was a result of bias or prejudice and that he would prefer that the matter be gone into;

(4) The cross-examination of Finch concerning certain information which was brought to him by newspaper reporters and to which he made replies, and

(5) The statement made by the court to Mr. Mulliner that no one was involved but Thacker on certain evidence.

It might be stated generally as to all these matters that even though it be conceded they were error, there was nothing in them which would in any way constitute prejudicial error. However, certainly there is no error involved. As to the letter, Exhibit B, defense counsel kept this letter out of evidence. However, certain conversations had by Fisher Harris with Mayor Erwin were pertinent in showing his conduct when speaking with persons involved in the investigation of the pay-off in Salt Lake City, as well as other matters heretofore mentioned. These conversations of necessity concerned the contents of this letter and before this Court can reverse this case on this point it must hold that the introduction of evidence with respect to these conversations was immaterial and prejudicial error, which under the authorities heretofore cited, were properly admitted in evidence.

So far as any accusation being made that defense counsel were trying to suppress facts, there is no instance of it in the record unless it is the single one referred to by counsel for defendant wherein the District Attorney stated, after a suggestion by defense counsel that he had not gone into a conversation, that he had not gone into it because ob-

jection would undoubtedly be made. The annotation in

78 A. L. R. 766,

and the cases therein mentioned show that it is reversible error only when repeated and continued accusations are made that counsel are trying to suppress the facts.

The first quotation on page 167 of the Pearce-Finch brief is not complete. It should continue as follows:

“It does not follow, however, that all remarks of this character constitute grounds for reversal. The appellate court must be satisfied from the record not only that the statements of the offending attorney were such as were likely to mislead or prejudice the jury against the appellant, but that, after objection, the court by failing to apply appropriate disciplinary measures or to give suitable instructions, left the jurors with wrong or erroneous impressions, which were likely to influence them improperly or to prejudice them to the disadvantage of the appellant.”

Harris' conversation with the judge was only a request by him to permit counsel to go into the matter of bias and prejudice, which defense counsel was apparently attempting to bring out. This conversation of Harris' was undoubtedly brought about by the imputation counsel was seeking to effect that Harris was in fact biased and prejudiced in his conduct in this investigation.

So far as the cross-examination relative to conversations had by Finch with newspaper men, this was only to bring out the knowledge of Finch that

vice establishments were in operation. Other evidence was introduced to this same effect and this evidence was only cumulative. In any event, Finch was asked four questions, and he stated in each instance that he would not or did not remember any such conversations, and in one instance he said that the conversation did not take place.

With reference to the statement by the court to Mr. Mulliner that the matter then before the court did not involve anybody but the defendant, Thacker, it should be pointed out that the record reflects that counsel for defendant Mr. Thacker, stated that he had no objection to the testimony. The testimony was only sought to be introduced as against Thacker. Mr. Mulliner continued to make objection and then the court made the statement set out on Page 170 of the Finch and Erwin brief. See Record, 2041 to 2046.

THE COURT DID NOT ERR IN REFUSING REQUESTS AND IN GIVING CERTAIN INSTRUCTIONS.

Both briefs filed by defense counsel contain arguments that error was committed in refusing certain requests and then in giving instructions. Counsel for Finch and Pearce divide this discussion into four parts and we will here notice them in the order in which they appear in his brief, starting at page 173.

The first subdivision refers to certain requested instructions on the subject of admissions by silence and consciousness of guilt. It involves defendant Pearce's requests Numbers 6, 8, and 11, found on pages 287, 288, and 292 of the Abstract. Request

Number 6 did not contain a correct statement of law in that it is there stated, "You are further instructed that there was nothing done or said by Pearce in those conversations which was or which can be considered by you as an admission on his part of guilt of the offense here charged or of guilt of any offense."

We have heretofore pointed out in this brief the fact that Pearce's conduct at this time would constitute an admission, and under the argument and authorities there cited, it is submitted that request Number 6 does not state the law.

Request Number 8 is also faulty in that it is too broad and does not relate to any specific testimony other than the mention of that given by Fisher Harris. It is also too broad because it would exclude statements acquiesced in by defendants, and certainly such statements are admissible in evidence. For instance, the statement made by Fisher Harris at the Alta Club in a conversation with Finch and Erwin, wherein he said that Finch and Erwin were receiving the sum of \$750.00 and \$500.00 respectively. If this were acquiesced in, then certainly it would be some evidence of the truth therein contained. Said instruction is also misleading.

Request Number 11 states the law to be that there is no admission by silence unless there is a direct accusation of the charge made in the case and it must be made to the defendant himself. It is submitted that under the authorities heretofore cited, this instruction does not correctly state the law, and therefore was properly refused.

Under the second subdivision of the Pearce-Finch brief on this particular subject, counsel complains

of failure to make instructions on larger and smaller conspiracies. Under the cases heretofore cited on the subject of variance, certainly the court was under no obligation to give such instructions. Counsel made no requests on this subject to which he was entitled. Some of those requested were given as requested or in substance. He refers to Pearce's request Number 3A found at page 284 of the Abstract. That request states that the testimony of H. K. Record relative to the conversation between himself and Pearce is not to be considered by the jury as any evidence or as tending in any way to prove the existence of the conspiracy here alleged. That conversation as heretofore pointed out was to obtain the services of someone to effect collections in furtherance of the conspiracy. Said request further states that such conversation in any view is as consistent with the absence of the conspiracy here alleged as it was with its existence, and was in no way in furtherance thereof.

Pearce in that conversation stated that he had been authorized by Erwin to make collections from gambling establishments and other forms of vice. Certainly this request was properly refused. Counsel then notes the failure to give the first part of request Number 4, found on page 285 of the Abstract. This portion of the request seeks to have the jury exclude from their considerations the collections made by Holt and by Abe Stubeck. Certainly if these collections were made, then they are some evidence that the houses of vice were being protected, and when considered with other evidence heretofore related, aid in the proof that a conspiracy to permit these places to operate existed. The second part of said request was given

by the court, it being instruction Number 15, found at Abstract 271.

Counsel next states that Pearce's Request No. 5 (Ab. 286) should have been given and that it was error not to give it. A number of instructions were given requiring that the jury find beyond a reasonable doubt that the conspiracy as alleged in the indictment existed. See instructions 4 (a), 4 (b), 4 (e), 4 (g), 9 (a) and 12 (a). In any event, as indicated by the case of

Berger v. United States, supra, the fact that two or more smaller conspiracies are proved is not such a variance as will result in a reversal.

Counsel set out Instruction Number 7 as given, but just what his criticism is of that instruction we are unable to determine. That instruction merely tells the jury that it is not necessary that the State prove that the defendants actually met or came together and expressly agreed to commit the conspiracy alleged in the indictment, but that the conspiracy may be shown by circumstantial evidence and that such circumstantial evidence must exclude every reasonable hypothesis of innocence and must convince said jury beyond a reasonable doubt. This certainly is a correct statement of the law.

In instruction Number 12, the instruction is to the effect that if each of the defendants, Erwin, Finch and Thacker wilfully failed to perform their duties and in that manner knowingly, enabled the operation of vice establishments, then such facts could be taken into consideration by the jury. Of course, this in and of itself, is not sufficient, but as indicated in other instructions there must be a participation in the conspiracy. Counsel has not cited

any case which shows that this evidence can not be taken into consideration. The case of

O'Brien v. United States, 51 Fed. (2d) 674,

indicates that this evidence may be taken into consideration.

Instruction 12 (a) (Abstract 269) is an instruction requested by defendant, Frank Thacker. Counsel's objection to this instruction seems to be that the jury was not instructed that it was necessary in order to convict the defendants to find that they knowingly participated in the conspiracy.

Instruction Number 4 (b) and Number 4 (c) points out to the jury this requirement. Here again counsel criticizes an instruction because it does not contain all of the law on the subject of conspiracy and as has been held many times by this and other Courts all the instructions must be looked to. The instruction does not say that if they find certain facts they are to find the defendants guilty, but merely says that before any verdict of guilt may be rendered certain things must be found. There is no attempt to state all the things that must be found before conviction would be justified.

In the third subdivision of this point, defense counsel criticizes Instruction Number 13 and states that the quoted part of the instruction refers to any conspiracy, but they leave out the first part of the instruction which states that they must find beyond a reasonable doubt that a conspiracy as alleged in the indictment existed. This is the conspiracy that the last of the instruction refers to as "said conspiracy" and "such conspiracy."

Counsel next claims that in the request found on page 282 of the Abstract they sought to have the

jury instructed that they were not to consider as proof of the conspiracy any statement, declaration or admission made by any conspirator. Such an instruction, of course, would exclude for example, the declaration of Pearce made to H. K. Record in attempting to find a collector, which certainly was material.

As to the next instruction considered to the effect that the existence of the conspiracy could not be established against any alleged conspirator by evidence, of acts or declarations of any other alleged conspirator done or made in the absence of the conspirator sought to be charged, Instruction Number 14 covers this matter. It might be pointed out that the request found on Page 282 of the Abstract contained statements which are not the law. It is submitted that Instruction Number 14 also fully covers the matter contained in that portion of Request Number 11 quoted on page 180 of the Finch and Erwin brief.

Counsel next finds fault with Instruction Number 16, but does not quote enough to show that the matter complained of is fully covered in that instruction. Counsel states that the following part of Instruction Number 16 is error "you must find from facts in evidence, from which it may be reasonably inferred that the offense was committed." In the first place counsel made no exception to this portion of the instruction. Counsel states that this applies to the entire instruction. In this we submit he is in error. The following is the introduction to Instruction Number 16:

"Before you can find the defendants, or any of them guilty of the offense charged in the indictment, you must find from the facts in evidence, from which it may be

reasonably inferred that the offense was committed in Salt Lake County, Utah, and you must find beyond a reasonable doubt each and every one of the following elements,"

and then sets out five subdivisions. In the first place let it be said that there was never any contention made that venue was not proven in this case. In the second place, this certainly required the proof of the elements thereafter set out to be beyond a reasonable doubt before a conviction could be had.

In Subdivision Number 4 of Instruction Number 16, the word "or" is used, but certainly from reading the instructions, it becomes clear that the jury was instructed more than once that they must find beyond a reasonable doubt that the conspiracy, as alleged in the indictment, existed. Subdivision Number 5 of Instruction Number 16 is not the only instruction given on overt acts. It merely sets forth the overt acts which were alleged and one of which must have been committed. Instructions Numbers 22 and 24 sufficiently set forth the law when coupled with Subdivision Number 5. These instructions point out that any overt acts must be done by fellow conspirators or by the defendants themselves.

Under the fourth subdivision of this point, counsel confidently relies on a misstatement contained in Instruction Number 15. Instruction Number 15 is Pearce's Request Number 4. Counsel has already assigned as error the failure to give his Request Number 4. However, it was given. Certainly, defendant Pearce can claim nothing for this misstatement. The only misstatement in Instruction Number 15 was that the witness, Stubeck, testified that he collected money. Of course, the testimony

was by Kempner that Stubeck collected it. However this instruction does not assume a fact necessary to be found. It is only a statement that Stubeck testified to a certain thing and if they believe that certain thing then they might not consider it was proof of an agreement unless certain other things were found. In

State v. Hanna, (Utah), 21 P. (2d) 537,
(1933),

the following instruction was given.

“And you are instructed in this connection, that if the evidence offered and received in this case raises in your minds a reasonable doubt as to the presence of the defendant at the place *where the offense was committed, at the time of the commission thereof*, then your verdict should be for the defendant, not guilty.”

Of course, in this instance, the court assumed that the offense had been committed and it was held reversible error. This case is in no way comparable to the slight misstatement made in Instruction Number 15.

The instruction quoted from

Holland v. State, (Texas), 206 S. W. 89,
was in effect covered in Instruction Number 22.

In the Erwin brief starting at page 64, counsel discusses certain instructions as being erroneous. He also criticizes Instruction Number 16 because it does not state that the overt acts must be done by one of the conspirators. As heretofore pointed out, Instructions Number 22 and Number 24 make this a requirement. Counsel also criticizes Instructions Number 22 and Number 24. In this Instruction Number 18 but again we refer the Court to

connection we particularly call the Court's attention to the language of Instruction Number 24 to the effect that the jury was further instructed, "in addition to all that the court has heretofore instructed you."

Instruction 9 (a) has been heretofore discussed and is not the only instruction on the subject therein contained. The jury could not convict on just one instruction and the necessity for the element of knowledge is very fully presented in Instruction Number 4 (b). Counsel criticizes Subdivision 5 (d) of Instruction Number 16 as permitting the jury to speculate as to what act might be therein included. Under this subdivision of the instructions, if a party to the conspiracy permitted, allowed, enabled and assisted a house of ill-fame to operate in violation of the State statutes and the ordinances of Salt Lake City, then the same was a sufficient overt act. As pointed out in the case of *People v. Tenorowicz*, this is such an act, and if it was committed then the verdict was justified.

Erwin's request, Instruction Number 19, seeks to exclude from the jury's consideration the testimony of Ben Hunsaker. Certainly this evidence was admissible and constitutes an admission on behalf of Erwin that he was a party to the conspiracy alleged in the complaint.

There was no error in the refusal of Request Number 22 because this sought to exclude from the consideration of the jury any evidence with relation to the conversation between Harris and Erwin. As heretofore pointed out, the statements of Erwin at this conversation were admissible to show a consciousness of guilt on his part and to prove certain statements made by Erwin, admitting his complicity in the conspiracy. If the evidence of these con-

versations was properly admitted, then certainly Instruction Number 22 was properly refused.

SUFFICIENCY OF THE EVIDENCE

Counsel for defendants insofar as the sufficiency of the evidence is concerned have taken an isolated fact and stated, this fact does not prove anything so we will disregard it. They then move on to the next fact and say the same thing and by this process eventually eliminate all the evidence in the case. After this elimination they say, there is no evidence.

On questions of the sufficiency of the evidence, cases usually stand or fall upon their own facts and circumstances. By this, counsel for the State means that after looking at the facts we must ask ourselves, "was a conspiracy proved in this case as alleged in the indictment?" To again re-argue and re-state the facts heretofore set forth would not be useful, however, it is submitted that when we consider all of this evidence together, we cannot help but come to the conclusion that all of the defendants were working together and to a common end, that is, permitting, allowing, assisting and enabling vice establishments to operate in violation of law for their own personal gain. Finch discussed the activities of Holt in opening and closing the vice establishments and also guided him to the persons who were to receive the moneys he collected. Pearce attempted to get someone to make the necessary collection and to keep the places of vice "in line," and the defendant, Erwin, admitted his participation in this conspiracy. This evidence irresistibly draws us to the conclusion that these

defendants conspired as alleged and that the overt acts as alleged were committed. In the case of

U. S. v. McKee, 26 Fed. Cas. No. 15,680
(1876) 3 Dill 551, (Circuit Ct., E. D.
Mo.),

instructions are set forth at length directing the jury as to the manner in which they are to consider the evidence. The instruction is as follows:

“When a conspiracy is shown to exist, the rule of law is that all acts done in furtherance of the conspiracy by any of the conspirators, though not in the presence of others, and all declarations made by any of the conspirators to advance the common cause, or *in connection with acts done in the promotion of the conspiracy*, though not made in the presence of the other conspirators, are evidence against all of the conspirators. One conspirator in such cases is bound by all the acts and declarations of his fellow conspirators done and made to promote the common object; but mere declarations, that is, statements of real conspirators, that some one else is a member of the conspiracy is not evidence to establish that fact. It must be established by independent evidence of the acts, conduct or admissions of the person himself, who is sought to be implicated; but if it is, by such other independent evidence, once established to the satisfaction of the jury that a person is a member of a conspiracy, then the rule above stated applies, and he is bound by the acts and declarations of his co-conspirators, done and made in furtherance of the illegal scheme, though

not made or done in his presence. This distinction is plain enough and when once clearly apprehended by the jury, not difficult of application.”

The rule in determining whether or not sufficient evidence has been produced to permit the case to go to the jury for its consideration is considered and stated in

State v. Llewellyn, 71 Ut. 331; 226 Pac. 261 (1928):

“The rule is controlled by the same principles in criminal cases as in civil procedure. And in a civil case, Stam v. Ogden P. & P. Co., 53 Ut. 248; 177 P. 218, this Court said: ‘It is familiar doctrine in this jurisdiction and perhaps in nearly every other where the jury system prevails, that, if there is any substantial evidence whatever upon which to base a verdict, the court will not withdraw the case from the jury or direct what their verdict should be.’”

The Court further states:

“Our conclusion is that upon a motion for a directed verdict of acquittal the province of the court is to consider and determine as a matter of law whether or not there is substantial evidence of the guilt of accused sufficient in law to support a conviction, and, if there is, to deny the motion and submit the case to the jury. If the court is dissatisfied with the weight and credibility of the evidence, he may afterwards, upon that ground, set aside the ver-

dict and grant a new trial, but such is no grounds for directing an acquittal."

The rule is not as indicated by counsel that the court must find the defendants guilty in his own mind. He should only determine whether there is "any substantial evidence whatever upon which to base a verdict." This is the rule which should govern this Court. In

Helton v. Commonwealth, 245 Ky. 7; 53 S. W. 89 (1932),

the defendants were charged with a conspiracy.

The Court there stated:

"A conspiracy is almost necessarily established by welding into one claim, circumstances which when considered separately are of themselves insufficient and inconclusive, but when connected and examined as a whole, are sufficient to show it.

The question whether there is a confederation or conspiracy, if there is any evidence, is in every case for the jury."

In *O'Brien v. United States*, 51 Fed. 674, (Seventh Circuit, 1931), the Court stated:

"The support which one may give to an unlawful conspiracy naturally differs. There are leading and minor roles to be played. One actor is active, another non-active. Omissions may, under certain circumstances, be tantamount to acts of commission. Guilt may in some instances be established by non doing, as well as by affirmative acts, provided the intended and actual effect of such non action is to

advance or consummate the object of the conspiracy.”

It was also pointed out by the court in this case that a defendant need not know the full extent of the conspiracy, nor the names of those participating. In

Breiner v. United States, 54 Fed. (2d)
1045 (Seventh Circuit — 1932),

the Court held that a defendant need not know all those persons participating in a conspiracy. In

Blanstein v. United States, 44 Fed. (2d)
163 (1930 — Third Circuit),

the Court stated that a conspiracy may be shown by direct and positive evidence, by declarations or writings, or by circumstantial evidence, such as show that the parties acted together or in concert, or in a manner warranting belief that their acts were the result of a previous agreement. In

Richards v. State, 43 Ohio App. 212; 183
N. E. 36 (1932),

the charge was forgery. However, a conspiracy was proved in connection therewith. The Court states that a conspiracy is usually proved by separate acts of several persons concentrating toward the same purpose and states as follows:

“ . . . the greater the secrecy that is observed relative to the object of such concurrence, and the more apparent the similarity of the means employed to effect the object, the stronger is the evidence of the conspiracy, and, where it is proved by their conduct that alleged conspirators, were pursuing the same object by the same means each performing a different part of the

act with a view to its attainment, it may be concluded that the parties were engaged in a conspiracy to effect that object, and a jury would be justified in so finding."

In *State v. Thompson*, 69 Conn. 720; 38 Atl. 868,

which is a case of conspiracy, the Court stated:

"The agreement to act in concert for the attainment of the fraudulent purpose is susceptible of proof in different ways. There may be direct evidence of the actual meeting and agreement to pursue the common object. The joint participation of all the persons charged, in the acts by which the common purpose is to be accomplished, may be shown by direct evidence. The combination may be established by proof of the admissions of each of the accused conspirators, who are parties to the action, made either during or after the accomplishment of the common purpose, proof of each admission being received in evidence only against the person making it. It may be proved by circumstantial evidence, by proof of the separate acts of the individuals, and of circumstances from which the illegal confederation may be inferred. From the nature of the offense itself, such corrupt agreement of the parties, entered into in secret, can only in exceptional cases be established in any other manner. (19 Conn. 233, 237)."

The rule as stated in

People v. Goldaher, 17 Cal. App. (2d) 195;
61 Pac. (2d) 675 (1936),

is that where the acts of the conspirators support a logical inference of conspiracy, that is sufficient.

In People v. Van Tassell, 156 N. Y. 561;
51 N. E. 274 (1898), the Court stated:

“It is well settled that where there is sufficient evidence to justify the conclusion that different persons charged with a crime were acting with a common purpose and design, although it does not appear there has been a previous combination or confederacy to commit the particular offense, yet acts and declarations of each, from the commencement to the consummation of the offense are evidence against the others. A conspiracy may be proved by circumstantial evidence, and parties performing disconnected overt acts, all contributing to the same result, may, by the circumstances and their general connection or otherwise, be satisfactorily shown to be confederators in the commission of the offense.” (cases cited)

In Garland v. State, 112 Md. 83; 75 Atl 631; 21 Ann. Cas. 28 (1910); 3 Greenleaf on Evidence, 16th Ed. 101, is quoted as follows:

“ If it be proved that the defendants pursued by their acts the same object, often by the same means, one performing one part and another another part of the same so as to complete it, with a view to the attainment of that same object, the jury

will be justified in the conclusion that they were engaged in a conspiracy to effect that object.”

We respectfully call the Court's attention to the case of

Allen v. United States, 4 Fed. (2d) 688
(Seventh Circuit, 1927).

This case is probably as close as any to the evidence introduced by the State in this case.

The case of People v. Tenorowicz, *supra*, is another case to which we respectfully call the attention of the Court. The case of

People v. Collier, 111 Cal. App. 215; 295
Pac. 898,

contains an excellent discussion as to the distinction of rules as to the weight and to the admissibility of evidence, and also as to general principles of law relating to conspiracies. An opinion on rehearing of this case is found in

People v. Shurtleff, 133 Cal. App. 739; 299
Pac. 92 (1931).

which affirms the conviction of one of the defendants whose conviction was reversed in the Collier case.

Under the rules heretofore set out, it is submitted that there is substantial evidence in this case upon which the jury could well have returned a verdict of guilty of the conspiracy as alleged in the indictment, and as pointed out in the above cases we must look at all of the evidence and not isolate the testimony of each witness or each fact.

IN ORDER TO JUSTIFY A REVERSAL THE
ERROR MUST ACTUALLY PREJUDICE
THE DEFENDANT.

Utah has a number of statutes relating to this subject.

Section 105-53-2, Revised Statutes of Utah, 1933, provides as follows:

“Neither a departure from the form or mode prescribed by this code in respect to any pleading or proceeding nor any error or mistake therein shall render it invalid unless it shall have actually prejudiced the defendant in respect to a substantial right.”

Section 105-43-1, Revised Statutes of Utah, 1933, provides as follows:

“After hearing an appeal the court must give judgment without regard to errors or defects which do not affect the substantial rights of the parties. If error has been committed, it shall not be presumed to have resulted in prejudice. The court must be satisfied that it has that effect before it is warranted in reversing the judgment.”

Numerous cases have been decided under these statutes and in all cases a substantial prejudice to the rights of the defendant is required to justify a reversal of the judgment. It is respectfully submitted that if there were any errors committed in the trial of this lawsuit that those errors were harmless and under the foregoing statutes affirmance by this Court is necessary.

CONCLUSION

Counsel for the state believe that the defendants and each of them received a fair trial and that a just verdict was rendered by the jurors in finding the three appealing defendants guilty. The indictment stated a public offense. The Bill of Particulars gave to the defendants in advance of the trial more of the evidence than they would have been entitled to under the old forms of pleadings. The testimony which was admitted in evidence before the jury was material, relevant and competent in every respect, and that evidence was sufficient to justify a verdict finding the defendants and each of them guilty of the crime of criminal conspiracy, in that they conspired to permit, allow and assist houses of ill-fame and gambling establishments to operate in violation of law.

It is respectfully submitted that this Honorable Court should affirm the judgment appealed from.

Respectfully submitted,

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